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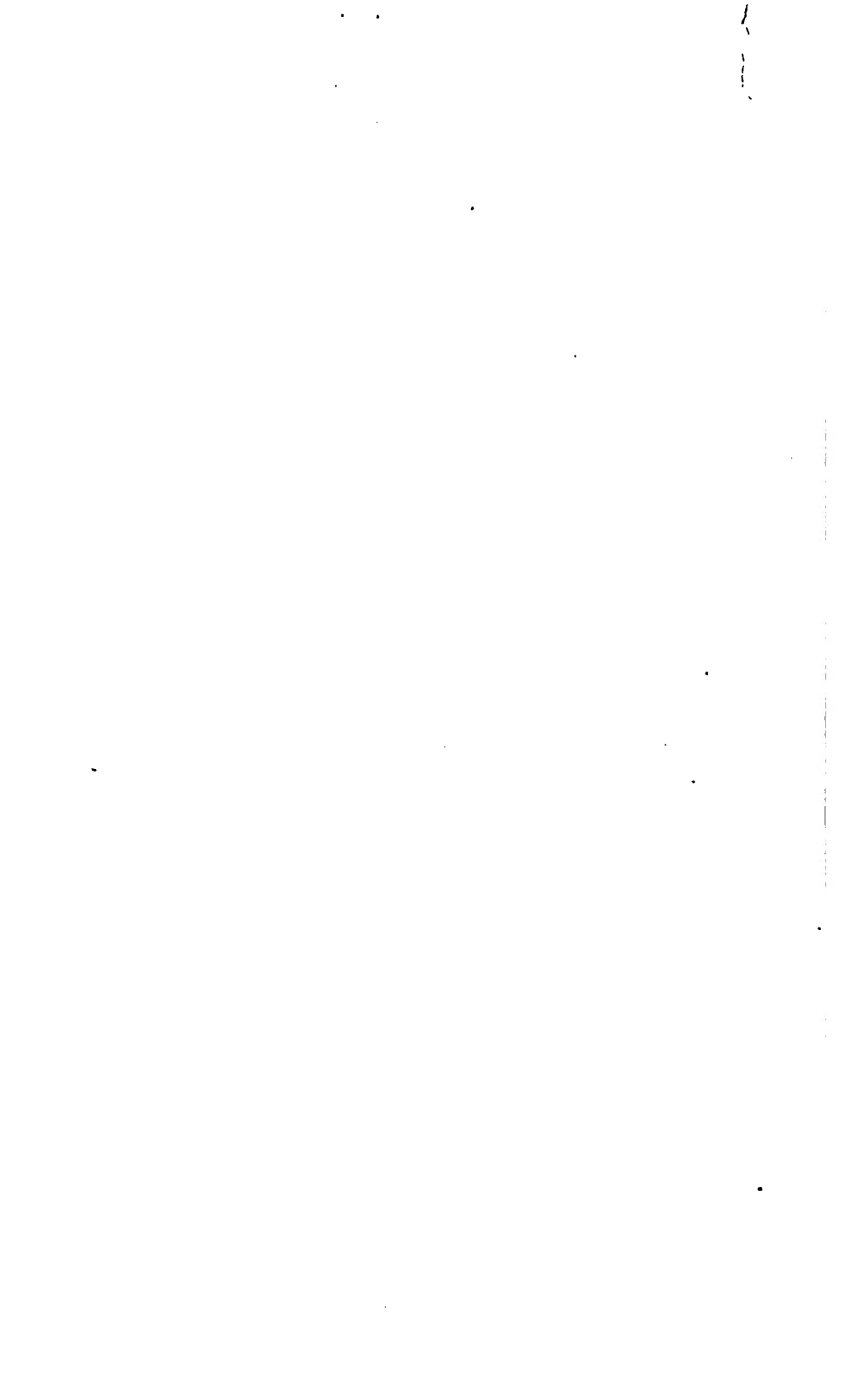
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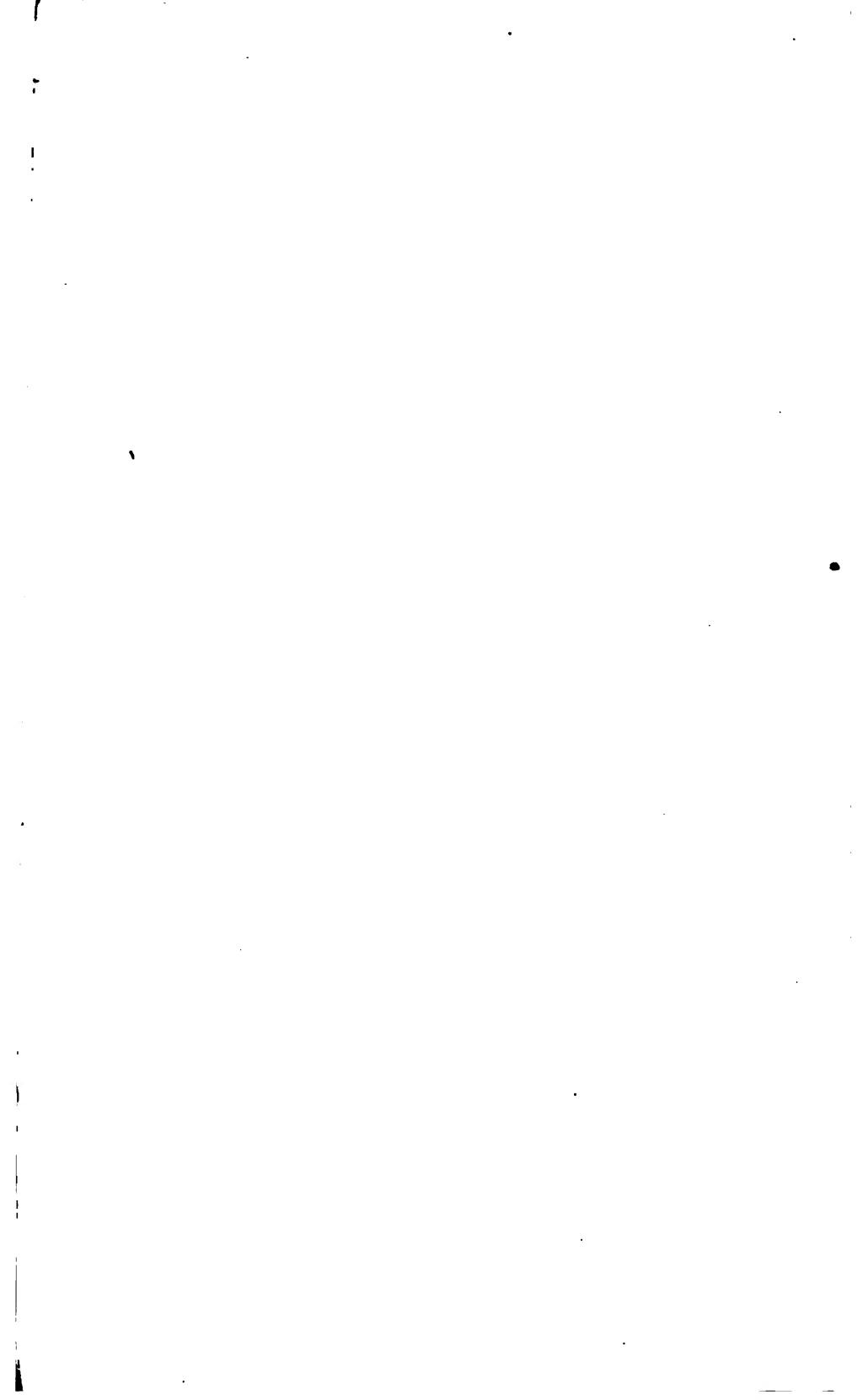


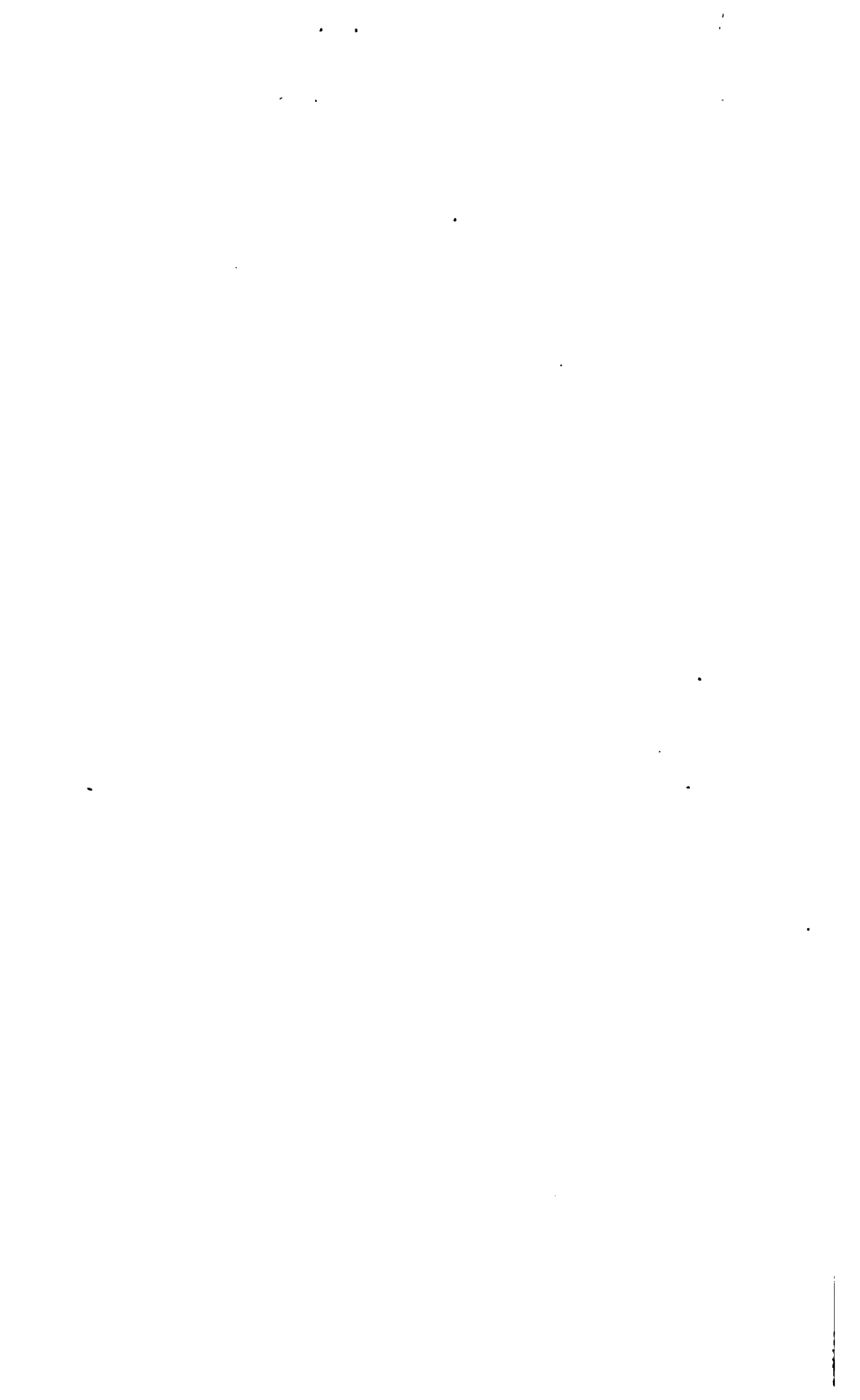
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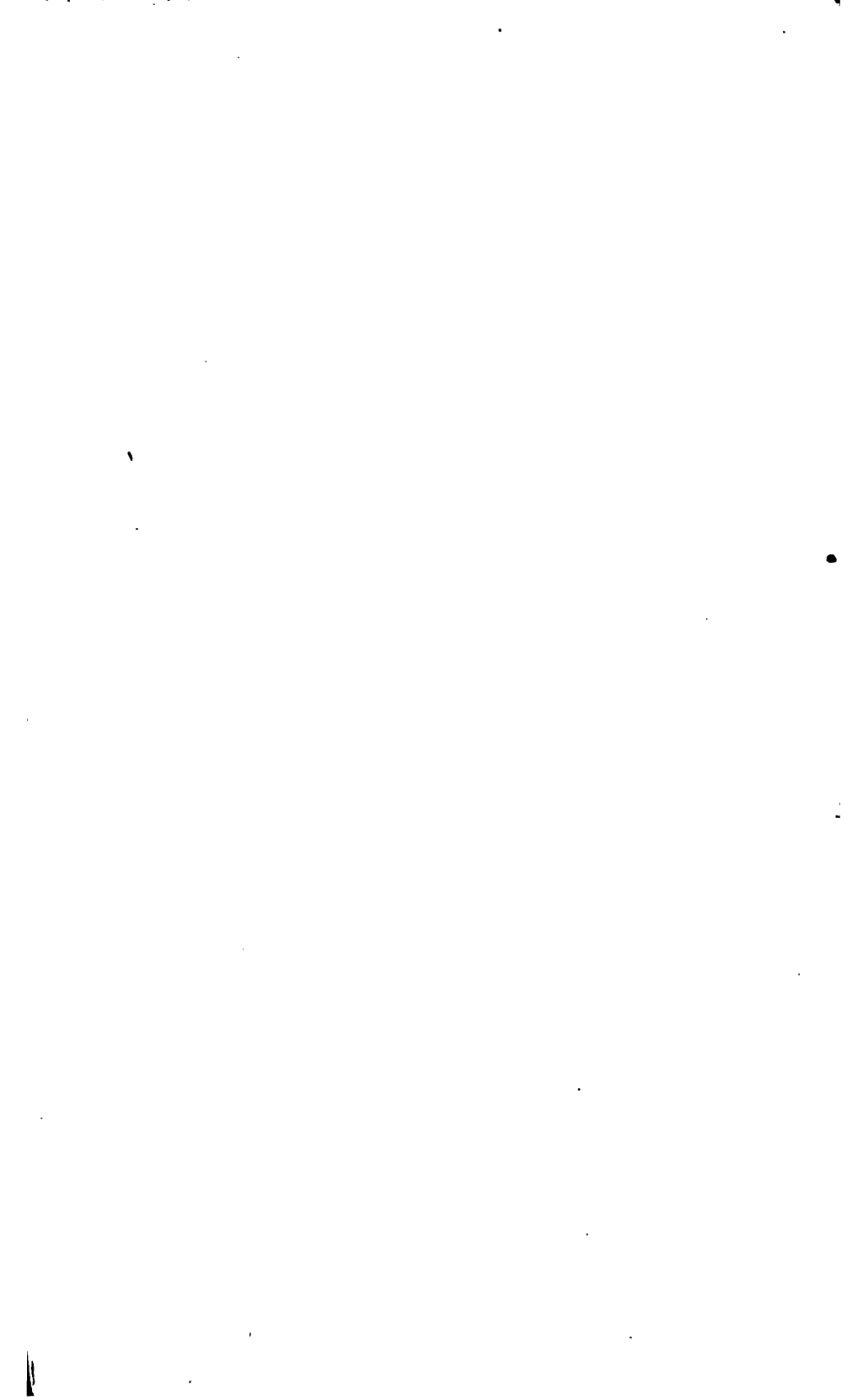
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REPORTS

July 31

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY JOHN W. KERN,
OFFICIAL REPORTER.

VOL. 101,

CONTAINING CASES DECIDED AT THE NOVEMBER TERM,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. ALLEN ZOLLARS.*†
HON. JOSEPH A. S. MITCHELL.†
HON. WILLIAM E. NIBLACK.†
HON. GEORGE V. HOWK.†
HON. BYRON K. ELLIOTT.§

*Chief Justice at the November Term, 1884.

†Term of office commenced January 1st, 1883.

‡Term of office commenced January 6th, 1885.

§Term of office commenced January 3d, 1881.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE A. BICKNELL.*†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. JAMES B. BLACK.†

HON. WALPOLE G. COLERICK.§

* Chief Commissioner.

† Appointed April 27th, 1881.

‡ Appointed May 29th, 1882.

§ Appointed November 9th, 1883.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
CHARLES E. COX.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1884, IN THE SIXTY-NINTH YEAR OF THE STATE.

No. 10,567.

STOCKWELL ET AL. v. STATE, EX REL. JOHNSON, AUDITOR.

DEMURRER TO EVIDENCE.—*Practice.*—By demurring to the evidence, the party demurring withdraws from the consideration of the court whatever is favorable to himself, admits as true all facts against him of which there is any evidence, and consents that whatever reasonable inferences can shall be drawn from the evidence against him.

SAME.—Upon such demurrer, the court will infer from the evidence every conclusion that a jury could reasonably have inferred.

SAME.—*Objections to Evidence.*—By demurring to the evidence, the party demurring waives all objections to its admissibility.

SAME.—*Motion for New Trial.*—*Waiver.*—When there has been a demurrer to the evidence, a motion for a new trial presents no question.

SAME.—*Defects in Pleadings.*—Defects in pleadings will not be considered as a reason for sustaining a demurrer to the evidence.

MORTGAGE.—*Foreclosure.*—*Parties.*—*Title.*—Parties claiming an interest in mortgaged land are proper parties defendants in an action to foreclose, and, when made parties, they are bound to set up their title or claim.

PLEADING.—*Practice.*—*Motion in Arrest.*—*Supreme Court.*—A complaint, to which no demurrer has been filed, will not be held bad on a motion in arrest, or on assignment in the Supreme Court that it does not state sufficient facts, simply because of containing statements of conclusions.

101	1
124	584
126	306

101	1
132	468
101	1
134	686

101	1
138	106
101	1
140	22

101	1
148	593

101	1
153	123

101	1
159	145

101	1
166	277

101	1
167	686

Stockwell et al. v. State, ex rel. Johnson, Auditor.

SAME.—Assignment of Error.—Answer.—An assignment of error in the Supreme Court, that the court below erred in sustaining a demurrer to a paragraph of answer, does not call in question the sufficiency of the complaint.

MORTGAGE.—Complaint to Foreclose.—Subsequent Purchaser.—Record.—Time.—Generally, a complaint to foreclose a mortgage against a subsequent purchaser from the mortgagor must allege that the mortgage was recorded at the place and time prescribed by the statute.

SAME.—Notice.—Privity.—The registry of a deed or mortgage is notice only to those who claim through or under the grantor or mortgagor.

SAME.—School Fund Mortgage.—Parties, holding or claiming through or under the mortgagor in a school fund mortgage, are bound to take notice of the mortgage, although not recorded as required by the general registry laws.

SAME.—Description.—Presumption.—Acknowledgment.—It appearing upon the face of a mortgage and the certificate of acknowledgment, that the mortgage was executed in this State, between residents thereof, the presumption, in the absence of anything in the instrument to the contrary, is, that the description was intended for lands in this State.

SAME.—Auditor.—Loan by, to Self.—A school fund mortgage is not void as to the State because the county auditor has made the loan to himself.

SAME.—Interest.—Such mortgage draws the same interest after as before maturity.

SAME.—Sale without Appraisement.—Upon the foreclosure of a school fund mortgage, the court may order the land sold without appraisement.

SAME.—Priority of Lien.—Taxes.—A sale of land for taxes which accrued after the execution of a school fund mortgage, is subject to the mortgage lien.

SAME.—Entry of Satisfaction.—Recorder.—Auditor.—The county recorder can enter satisfaction of a school fund mortgage before foreclosure, only upon an endorsement by the county auditor that the same has been fully paid.

SAME.—Clerk.—School Fund.—Foreclosure.—Evidence.—For the purpose of showing that the law was complied with in making a loan of the school fund, the certificate by the clerk and recorder, and the affidavit of the mortgagor, required by the statute, are competent evidence, and, being competent for this purpose, a general objection to such evidence is properly overruled.

SAME.—Title of Mortgagor.—Presumption of Ownership.—A mortgagor is presumed to be, at the time, the owner of the land mortgaged, until something to the contrary appears.

SAME.—Possession by Mortgagor.—The possession of the land by the mortgagor, at the time of executing the mortgage, is *prima facie* sufficient to show that he was the owner.

SAME.—Parol Evidence.—Title to real estate may be proved by parol, where such evidence is not objected to.

Stockwell *et al.* v. State, *ex rel.* Johnson, Auditor.

SAME—Title from Same Source.—When two persons derive title from the same third person, it is, at least, *prima facie* sufficient to prove derivation from him without proving his title.

From the Gibson Circuit Court.

A. Gilchrist, L. C. Embree and T. R. Paxton, for appellants.

F. T. Hord, Attorney General, *J. W. Ewing and C. O. Erwin*, for appellee.

ZOLLARS, C. J.—This is an action by the State, on the relation of John W. Johnson, auditor of Gibson county, to foreclose a school fund mortgage executed by Willis S. Hargrove and wife, on the 12th day of November, 1866, to secure the payment of a note for one thousand dollars.

The defendants Stockwell and Viele demurred to the evidence. This was overruled, and a decree was rendered foreclosing the mortgage against all of the defendants. As to appellants Stockwell and Viele, the overruling of their demurrer to the evidence is the first and the important question for decision.

The complaint charges the execution of the note and mortgage by Hargrove and wife upon real estate in Gibson county, describing it, the recording of the mortgage in that county in January, 1867, the death of Hargrove and wife, and that since the execution of the mortgage the land has been conveyed to appellants Stockwell, Viele and Paxton, who claim to be the owners thereof; that they hold by privity of title with said Hargrove, and that their rights are junior to the lien of the mortgage in suit. A copy of the mortgage was filed as an exhibit, and as a part of the complaint. In the mortgage, the State and county are not given in the description of the land.

A joint answer by all of the defendants, setting up title in themselves by virtue of a sale of the land for taxes in 1877, was held insufficient on demurrer. The only remaining answers were a general denial and payment. To the latter, there was a reply of general denial. To make its case, the State introduced the following documentary evidence:

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First. A deed for the land from John L. Key in 1864, to said Hargrove.

Second. The note and mortgage described in and filed as a part of the complaint, dated the 12th day of November, 1866, together with a certificate of the clerk and recorder of Gibson county, and an affidavit of Hargrove, which were upon the same paper with the mortgage, and were also filed with the complaint, as a part of the mortgage. These were made for the purpose of procuring the loan from the State. In this certificate, it is stated that the land mortgaged by Hargrove is in Gibson county, this State, and had not been conveyed or encumbered by Hargrove, nor by any person under whom he claimed title. In the affidavit by Hargrove, he stated that he was the legal owner of the land, and traced the title from himself, through mesne conveyances, back to the United States.

Third. A deed from the sheriff of Gibson county to Caleb Trippet for thirty-five acres off of the east end of the land, dated the 10th day of May, 1876. This deed is based upon a judgment in favor of Trippet against Hargrove in 1874. It appears from the recitations in the deed, that the whole of the land described in the mortgage was bought in by Trippet; that he received a sheriff's certificate for the whole, and that before getting a deed, he so assigned the certificate to one Lucius French as to entitle him to the west forty-five and one-half acres of the land so purchased. Hence the sheriff's deed to Trippet conveyed only the remaining east thirty-five acres.

Fourth. A deed from Trippet to appellant Thomas R. Paxton for this thirty-five acres, dated March 2d, 1878.

Fifth. A deed from the sheriff of Gibson county to appellants Stockwell and Viele, for the forty-five and one-half acres above mentioned, dated April 20th, 1880. This deed is based upon a judgment and decree in favor of said appellants, against said Lucius French, rendered at the August term, 1878, of the Gibson Circuit Court.

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There was oral testimony on the part of the State as to the genuineness of the signatures of Hargrove and the clerk and recorder to the several documents executed by them as above ; that during the year 1866 Hargrove lived on the Key farm in Gibson county ; that during that year he was auditor of Gibson county, and that he died in 1879.

The above and foregoing was the evidence, substantially, in favor of the State. For the purpose of a decision upon the ruling of the court below, in overruling the demurrer to the evidence, we need not set out the evidence offered by appellants.

In the case of *Lindley v. Kelley*, 42 Ind. 294, it was held that upon a demurrer to evidence no advantage can be taken of any defect in the pleadings as a reason for sustaining the demurrer ; that upon such demurrer the court will infer from the evidence every conclusion that the jury could reasonably have inferred from it ; that all of the facts of which there is any evidence are admitted, and all conclusions which can fairly and logically be deduced from those facts.

In the case of *Ruff v. Ruff*, 85 Ind. 431, it was held that by demurring to the evidence when conflicting, the demurring party withdraws from the consideration of the court whatever is favorable to himself, and consents that whatever reasonable inferences can, shall be drawn from the evidence against him.

In the case of *Ruddell v. Tyner*, 87 Ind. 529, the same rule was announced, and it was further held, that where there has been a demurrer to the evidence, a motion for a new trial presents no question.

In the case of *Talkington v. Parish*, 89 Ind. 202, it was held that a demurrer to the evidence admits all facts which the evidence tends to prove, and all reasonable inferences which may be drawn from them, but that forced and violent inferences are not admitted.

In the case of *Kincaid v. Nicely*, 90 Ind. 403, it was held that where, upon a demurrer to the evidence, there is evidence tending to sustain the party having the burden of the proof, the demurrer should be overruled.

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In the case of *Miller v. Porter*, 71 Ind. 521, it was said, that by demurring to the evidence, the demurring party waives all objections to its admissibility, and admits as true every conclusion which the jury could reasonably have drawn from it.

We need not here determine as to the competency of all of the evidence on the part of the State. By demurring to it, appellants Stockwell and Viele have treated it as competent, and consented that such weight shall be given to it, and such inferences drawn from it, as the rules of law will warrant. Thus regarding the evidence, and applying the rules established by the above cases, the evidence, at least, tends to show that Hargrove was the owner, and in the possession, of the land at the time the mortgage was executed by him, and that the title came to him, through mesne conveyances, direct from the United States. This being so, whatever title appellants had, if any, was subordinate to his and to the mortgage in suit.

If any force be given to the recitation in the sheriff's deed to Trippet, that French, by the assignment of the certificate, acquired an interest in the forty-five and one-half acres, then it clearly appears that appellants Stockwell and Viele derived title through Hargrove subsequent to the mortgage. In such case, they were proper and necessary parties defendants. If no force is to be given to such recitation, then there is nothing to show that French had any interest in or title to any portion of the land, and consequently nothing to show that Stockwell and Viele had any title, although they had a sheriff's deed based upon a judgment against French. Having such deed, they were proper parties defendants. If they indeed had no title, it is difficult to see how they could be injured by the foreclosure. They had a deed, and if they claimed anything under it, although they acquired no title by it, appellee was entitled to a foreclosure against them. Upon a demurrer to the evidence, whatever the rule may be in other cases, it was not essential that the proof should correspond exactly to the averment in the complaint, that Stockwell and Viele held in privity with Hargrove. They were

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brought into court to answer to the complaint charging that they claimed an interest, and that it was junior and subordinate to the mortgage. This was a challenge to them to set up whatever title they had or claimed to have. *Hose v. Allen*, 91 Ind. 497. In response to this challenge, they set up no title except the tax title, and this went out upon demurrer.

If these appellants held or claimed through or under Hargrove, they were bound to take notice of the school mortgage, although it was not recorded as required by the general registry laws. *Deming v. State, ex rel.*, 23 Ind. 416. If they did not so hold or claim, it is immaterial whether or not they had any notice of the mortgage, as French, from whom they claim to have derived title, unless he derived his title through Hargrove and subsequent to the mortgage, is not shown to have had any title whatever. As against the showing in favor of title in Hargrove, by a direct line of conveyances from the United States, we can not surmise, upon the demurrer to the evidence, that French may have, in some way, acquired a title superior to the lien of the mortgage.

It is insisted further by these appellants, that the demurrer to the evidence should have been sustained because of a failure to give the county and State, in the description of the land in the mortgage. In their argument upon this point, which is elaborate and able, we are asked to overrule the case of *Dutch v. Boyd*, 81 Ind. 146, in which it was held, that it appearing upon the face of the mortgage and from the certificate of acknowledgment, that the mortgage was executed in this State, between residents of the State, the presumption, in the absence of anything in the instrument to the contrary, is, that the description was intended for lands in this State. We recognize the force of counsel's argument, but we are not satisfied that the doctrine of that case should be departed from. Besides, that case has been several times cited and followed. *Wilcox v. Moudy*, 82 Ind. 219; *Smith v. Clifford*, 83 Ind. 520; *Keepfer v. Force*, 86 Ind. 81; *Brown v. Ogg*, 85 Ind. 234. This last case, as to the description of

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the land, is identical with the one in hearing. In the case in hearing, not only is the residence of the mortgagors shown to be in this State by the mortgage, but the other dealings with the land show it to be in this State; for example, the land was sold to Trippet by the sheriff of Gibson county on a judgment and decree against Hargrove. In the sheriff's deed, the land is described as being in Gibson county, in this State, and so it is described in the other sheriff's deeds above referred to.

It is contended further that the mortgage is void, because, when executed, the mortgagor Hargrove was the auditor of the county, and made the loan to himself. Manifestly, the auditor had no right to make a loan to himself, but this will not defeat the right of the State to recover. The State can not in any sense be said to be *in pari delicto*. The general rule is, that contracts in violation of law are void, but this rule will not be extended and applied to a case like this, so as to enable the wrong-doer to take advantage of his own wrong against an innocent party. *Deming v. State, ex rel.*, 23 Ind. 416; *Scotten v. State, ex rel.*, 51 Ind. 52; *New England Fire, etc., Ins. Co. v. Robinson*, 25 Ind. 536; *Behler v. German Mutual Fire Ins. Co.*, 68 Ind. 347, 354.

If the auditor were seeking to enforce a right under the contract, or make defence by reason of its infirmity, a different question would be presented. In such a case it was said, in *Ware v. State*, 74 Ind. 181, that the loan was void as to the wrong-doer. This was not, and was not intended to be, an adjudication that the mortgage in such case would be, in the full sense, void, so as to defeat the State in a recovery. The purpose of the inhibition is to protect the fund; it must not, therefore, be so applied as to destroy the fund.

The further objection is made, that the decree orders the property sold without relief from valuation and appraisement laws. As these appellants are not shown to have had any substantial interest in the land, they are not in a condition to be injured by the form or substance of the judgment. We

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think, however, that under section 4390, R. S. 1881, the court had authority to decree the sale of the land without appraisal.

Under a motion for a new trial, filed by these appellants, they seek to question the ruling of the court below in the admission and exclusion of testimony. By demurring to the evidence, these questions were waived. By such demurrer, the demurring party says, in effect, that waiving all questions upon the exclusion of testimony, and admitting that the testimony before the court on behalf of the adversary is competent, material and relevant, it is not sufficient to make a case in his favor. *Ruddell v. Tyner*, 87 Ind. 529. The amount of recovery is not too large. The mortgage drew the same interest after as before maturity. *Shaw v. Rigby*, 84 Ind. 375 (43 Am. R. 96).

We have now examined all of the questions made by the appellants Stockwell and Viele, and find that they are not such as to require a reversal of the judgment.

Appellant Paxton files a separate brief in this court, and presents some questions not discussed by counsel for the other appellants, Stockwell and Viele. He is in a position to present questions which they can not, as he did not demur to the evidence.

As already stated, appellants filed a third and joint answer, setting up title in themselves by virtue of a sale of the land for taxes. This answer was in bar to any recovery by the State, and presents the question as to whether or not a sale of the land for taxes, after the execution of the mortgage, and for taxes which accrued after the execution of the mortgage, destroys the mortgage lien and gives to the purchaser at such tax sale a title superior to the mortgage.

We had occasion, recently, to examine this question and decided in favor of the mortgage lien as against such tax title. *State, ex rel., v. Jones*, 95 Ind. 175. It is provided by the statute, that "Mortgages taken for such loans shall be considered of record from the date thereof, and shall have pri-

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ority of all mortgages or conveyances not previously recorded, and all other liens not previously incurred, in the county where the land lies." Section 4380, R. S. 1881. It is also provided in the tax law, that the deed, executed by the auditor for land sold for taxes, shall vest in the grantee an absolute estate in fee simple, subject to all claims which the State may have on such land for taxes, liens or encumbrances. In this case the taxes accrued, and the sale was made, after the execution of the mortgage in suit. By the express provisions of the statute, therefore, whatever title appellants had by virtue of the tax sale and deed, was subject to the claim of the State under the mortgage. An answer setting up such title, therefore, is not a sufficient answer in bar of the State's action upon the mortgage.

It is further contended by this appellant, that the demurrer to the answer should have been carried back and sustained to the complaint. What we have already said in relation to the averments in the complaint, as to the location of the land in Gibson county, and the description of the land in the mortgage, will suffice here in response to appellant's point, that the complaint is bad because of the alleged insufficient description in the mortgage. As we have said, the complaint challenged the defendants to set up their title. It was not incumbent upon the State to show by averment that the amount of the mortgage could have been made by filing the claim against the estate of Hargrove. If this is a case in which equity would require the exhausting of Hargrove's estate before proceeding against the land in the hands of appellants, and they sought the benefit of that rule, it was incumbent upon them to show the case to be such by a proper answer. Appellant Paxton is not in a condition to require further proof of Hargrove's title, as whatever interest or title he has in or to the land, he holds under Hargrove. As shown by the evidence, Trippet bought the land at sheriff's sale on a judgment against Hargrove, subsequent to the mortgage, and Paxton holds by a deed from Trippet.

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It is further insisted by this appellant, under his motion for a new trial, that the court erred in admitting in evidence the certificate of the recorder and clerk, as to encumbrances upon the land, and the affidavit of Hargrove as to his title. Conceding that the objection and exception to this evidence were properly made and saved, we think that there was no error. The statute requires such certificate and affidavit in making a loan of the school fund. Sections 4375 and 4376, R. S. 1881.

For the purpose of showing a compliance with the law in making the loan, if for no other purpose, the certificate and affidavit were competent evidence; and if competent for any purpose, the objection as made was properly overruled. *Elliott v. Russell*, 92 Ind. 526.

Upon the whole evidence, as set out in the bill of exceptions, we think that the appellant was chargeable with notice of the mortgage. Section 4380, R. S. 1881; *Deming v. State, ex rel.*, 23 Ind. 416.

Complaint is also made, that the trial court erred in excluding an entry of satisfaction of the mortgage made upon the face of the record thereof in 1873, by the recorder of Gibson county. The mortgage was to secure a note for \$1,000. The entry of satisfaction offered is as follows:

"This mortgage satisfied in full, by filing in my office the treasurer's receipt for the sum of three hundred and twenty-five dollars, May 15th, 1873.

J. C. HALCOME.

"Attest: THOMAS J. ROBB, R. G. C."

The statute provides, that whenever the amount due on such mortgage shall be paid, and the treasurer's receipt therefor filed with the auditor, he shall endorse on the note and mortgage that the same has been fully satisfied, and surrender the same to the person entitled thereto, and on production of the same, thus endorsed, the recorder shall enter satisfaction upon the record. Sections 4388 and 4389, R. S. 1881. The record shows no such endorsement by the auditor, nor is there anything in the record showing, or tending to show,

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that "J. C. Halcome" was, at any time, the auditor of the county. This, at least, should have been shown, as the recorder had no authority to enter satisfaction in the first instance, nor had he authority to record any satisfaction unless the same was executed by the county auditor. For aught that appears, Halcome may have been a mere spoliator.

Having examined the several questions discussed by counsel, we are of the opinion that the judgment should be affirmed. It is, therefore, affirmed with costs.

Filed May 6, 1884.

ON PETITION FOR A REHEARING.

ZOLLARS, J.—Apparently, counsel argue with much zeal, and with the utmost confidence in the correctness of their several positions, that the petition for a rehearing by Stockwell and Viele should be granted. Their contention is, first, that the evidence is not sufficient to bring home to Stockwell and Viele notice of the school mortgage. In support of this contention, we are cited to the cases of *Magee v. Sanderson*, 10 Ind. 261; *Peru Bridge Co. v. Hendricks*, 18 Ind. 11; *Faulkner v. Overturf*, 49 Ind. 265; *Martens v. Rawdon*, 78 Ind. 85; *Scarry v. Eldridge*, 63 Ind. 44. These cases assert the well settled doctrine, that in an action to foreclose a mortgage against a subsequent *bona fide* purchaser from the mortgagor, it must be shown by the averments in the complaint, that the mortgage was recorded at the place and time provided by the statute. It is also the law in this State, that the registry of a deed is notice only to those who claim through or under the grantor by whom the deed was executed. *Corbin v. Sullivan*, 47 Ind. 356. This same rule may be applied to mortgages.

The mistake of counsel is in the proper application of the doctrine of these cases to the case in hand. If Stockwell and Viele had no title or interest in the land at all, they are in no condition to ask a reversal of the judgment of foreclosure, because that foreclosure could in no way affect them.

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And if they stood by and offered no evidence to establish a title or interest to or in the land in themselves, or if, by demurring to the evidence, they withdrew from the consideration of the court all of the evidence by them offered, they can not now complain of the decree of foreclosure. They were challenged to set up their title or interest, if they had any. They can not disregard this challenge, and then complain that the plaintiff did not protect their title and interest. *Carver v. Carver*, 97 Ind. 497, and cases there cited. They did set up a title by tax deed, and upon the answer being demurred out, they abandoned the claim. Counsel assume the whole case, by assuming that Stockwell and Viele did, or might have acquired title other than through or under Hargrove. The evidence shows that they acquired title through and under Hargrove, or they had no title at all. Key conveyed the land to Hargrove in 1864. In 1866, Hargrove and wife executed the mortgage in suit. In 1874, Trippet recovered a judgment against Hargrove, and a decree for the sale of the land in question, as Hargrove's land. The land was sold on that decree and Trippet bought it in. He received the certificate of purchase from the sheriff, and so assigned it to French as to entitle him to receive from the sheriff a deed for forty-five and one-half acres of the land. This same forty-five and one-half acres, Stockwell and Viele afterwards bought at sheriff's sale as the land of French. True, there is a *possibility* that French might have had title other than through Trippet's purchase and the assigned certificate, but upon a demurrer to the evidence courts will not look after possibilities. The only inference, and the legitimate inference, to be drawn from the evidence in this case is, that French's title was that which he derived through the assigned certificate, and this carries us back to Hargrove's title. Stockwell and Viele must, therefore, be held to have derived title through and under Hargrove. By a very casual examination of the sheriff's deed to Trippet, which constituted a part of their chain of title, they would have learned

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that their title was traceable back to Hargrove. See *Wiseman v. Hutchinson*, 20 Ind. 40; *Hazlett v. Sinclair*, 76 Ind. 488 (40 Am. R. 254); *Martindale Law of Conv.*, section 74, and cases there cited. When the conclusion is reached that they derived title through and under Hargrove, then the case of *Deming v. State, ex rel.*, 23 Ind. 416, cited in the principal opinion, applies, and they were bound to take notice of the mortgage, although it may not have been recorded.

It is next contended that the judgment should be reversed because the evidence does not show title in Hargrove at the time he made the mortgage; and it is asked, with some emphasis, whether this court will hold, that title to real estate may be established by the affidavit of a party claiming to own it.

To that inquiry we very readily answer no, if any objection be made to such evidence. But if the parties will agree to waive the production of the proper evidence, and agree that such evidence shall take its place, as competent evidence, then we know of no reason why the appellate courts should interfere and overthrow judgments, and involve increased costs to the parties and to the public, because upon such agreement the best evidence was not brought forward.

Hargrove's affidavit as to his title to the land was admitted in evidence by the trial court, and instead of contesting the case upon the ground that the affidavit was improperly admitted as evidence, Stockwell and Viele demurred to the entire evidence, and thus, under the well settled rule, as laid down in the case of *Miller v. Porter*, 71 Ind. 521, waived all objections to the admissibility of the evidence, and to each and every part of it. They said in their demurrer, what the law also said for them: "The said defendants admit the written evidence, and all the facts stated by the witnesses hereinbefore set out, and every inference and conclusion the court may rightfully and reasonably draw therefrom." Having thus, by resort to the demurrer, waived all objections to the admissibility of the evidence, it stands in the record pre-

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cisely as if it had been admitted without objection by Stockwell and Viele, or with their positive consent. And thus the case falls within the rule laid down in the case of *Compton v. Ivey*, 59 Ind. 352; that title to real estate may be proved by parol when the evidence is not objected to.

If it should be conceded that the evidence under consideration was not sufficient to establish title in Hargrove at the time he executed the mortgage, it would not follow at all, that the judgment should be reversed. In the first place, Hargrove having executed the mortgage, it ought to be presumed, until something to the contrary appears, that he was at that time the owner of the land. *Robinson v. Leach*, 10 Ind. 308. In the second place, the evidence is clearly sufficient to justify the inference, that at the time Hargrove executed the mortgage, he was in open possession of the land under a deed from Key. Proof of this possession was *prima facie* enough to show that he was the owner. In a case like this, at least, that ought to be so, until something to the contrary appears. *Robinoe v. Doe*, 6 Blackf. 85; *Sheets v. Dufour*, 5 Blackf. 549; *Shiel v. Ferriter*, 7 Blackf. 574; *Morss v. Doe*, 2 Ind. 65; *Holten v. Board, etc.*, 55 Ind. 194; 3 Wait Actions and Defences, p. 10, and cases there cited. And, in the third place, whatever title Stockwell and Viele are shown to have, they derived from Hargrove. They thus derived title from the same person who executed the mortgage. Mr. Greenleaf says: "Where both parties claim under the same third person, it is *prima facie* sufficient to prove the derivation of title from him, without proving his title." See, also, *Wilson v. Peelle*, 78 Ind. 384; *Bennett v. Gaddis*, 79 Ind. 347. Some of the authorities state the rule in such a case stronger. See 3 Wait Actions and Defences, p. 17, and cases there cited.

In any view that may be taken of the case, as it comes before us, these appellants were not entitled to have their demurrer to the evidence sustained, and are not entitled to a rehearing. Their motion for a rehearing is overruled.

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Appellant Paxton has also filed a petition for a rehearing, again assails the complaint, and contends that the demurrer filed to the answer should have been carried back and sustained to the complaint. We noticed this contention somewhat in the principal opinion, although the question is not properly presented by the assignment of errors. One of the assignments of error by this appellant is, that the court below erred in sustaining the demurrer to the third paragraph of answer. This assignment brings in question the sufficiency of that paragraph of answer and requires an examination of it, but it does not require an examination of the complaint, or call in question its sufficiency. The statute requires that the errors relied upon shall be *specifically* assigned. R. S. 1881, sec. 655. That the assignment of errors must be specific and definite, and that the questions to be considered here will be limited by the assignment, has been many times ruled by this court. *Kimball v. Sloss*, 7 Ind. 589; *King v. Wilkins*, 10 Ind. 216; *Ruffing v. Tilton*, 12 Ind. 259; *McCallister v. Mount*, 73 Ind. 559; *Board, etc., v. Byrne*, 67 Ind. 21; *Williams v. Riley*, 88 Ind. 290.

It is very clear that the complaint can not be examined, or passed upon, under this assignment of error. To make the question which this appellant seeks to make, he should have assigned as error, that the court below erred in not carrying the demurrer back, and sustaining it, to the complaint. There was no demurrer to the complaint below. There was a motion to arrest the judgment which was overruled, and appellants excepted. That ruling is assigned as error here, and brings in question the sufficiency of the complaint. The sufficiency of the complaint is also brought in question by the assignment, that it does not state facts sufficient to constitute a cause of action. But these assignments raise the question only of the sufficiency of the complaint after verdict. It is argued now, that the complaint is insufficient, because the facts alleged therein are not sufficient to bring home to Paxton notice of the mortgage. The averments are, that the mort-

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gage was executed on the 12th day of November, 1866, and duly recorded by the recorder of deeds of Gibson county on the 14th day of January, 1867; "that subsequent to the execution of said mortgage, said lands have been conveyed to said defendants, Paxton, Viele and Stockwell, who now claim to be owners thereof, but that they hold said lands by privity of title with said Hargrove, and their rights thereto are junior to the lien of said mortgage." Although it is not necessary, as to school mortgages, as we have seen, the mortgage here is shown to have been properly recorded within the time fixed by the statute then in force. 1 G. & H. 260. If, then, appellants held the land by privity of title with Hargrove, and their rights thereto were junior to the lien of the mortgage, they were bound to take notice of the mortgage, and held subject to it. It is contended that this is not sufficiently shown by the complaint, because conclusions and not facts are stated. If it be conceded that the averments of the privity of title, and the juniority of rights, are averments of conclusions, as contended, it does not follow, when the question is made for the first time after verdict, that the defect may be made available as error. This is such a defect as ought to be, and we think is, cured by the verdict. It is not a case of an entire want of a material and essential averment, but rather a case of a defective averment that might have been amended below, and which, not having been questioned before verdict, should be disregarded on appeal. R. S. 1881, sections 398 and 658; *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380; *Smith v. Freeman*, 71 Ind. 85; *Indianapolis, etc., R. R. Co. v. Petty*, 30 Ind. 261; *Charlestown School Tp. v. Hay*, 74 Ind. 127; *Parker v. Clayton*, 72 Ind. 307; *Indianapolis, etc., R. R. Co. v. McCaffery*, 72 Ind. 294, and cases cited.

Other questions are discussed by counsel, but it would extend this opinion beyond proper limits to set out the results of our examination, and our conclusion upon each question. We have examined them all carefully, but find nothing in

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them that would justify the granting of a rehearing. The important ones are disposed of by what has been said upon the petition of Stockwell and Viele. The motion for a rehearing is therefore overruled.

Filed June 9, 1885.

No. 11,691.

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REAL ESTATE.—*Forcible Entry and Detainer.—Peaceable Possession.—Claim of Right.—Restitution.—Damages.*—Under section 5237, R. S. 1881, one who, while in the actual peaceable possession of real estate under a claim of right, has been forcibly evicted by the owner, and possession forcibly detained from him, can maintain an action for restitution and damages.

EVIDENCE.—*Refusal to Admit Testimony of Witnesses.—Practice.*—Questions upon the refusal to admit evidence from a witness can only be saved by propounding to the witness some pertinent question, and, upon objection made, stating to the court, as it may direct, the testimony which such witness would give in answer thereto.

From the Warren Circuit Court.

T. F. Davidson and *W. B. Durborrow*, for appellant.

J. McCabe and *E. F. McCabe*, for appellee.

MITCHELL, J.—The question to be determined in this case involves the right of the owner of real property to take possession of it by force, against another who is in the peaceable possession of it without any other right except such as results from his actual peaceable possession, under a claim of right.

The complaint averred that on the 6th day of March, 1884, the plaintiff, Citizen, was in the lawful and peaceable possession of a certain ten-acre tract of land in Warren county, which had upon it a dwelling-house which he was occupying with his family as tenant from year to year, when it is alleged that defendant Judy, accompanied by four others, with force and violence entered, and with threats and menaces evicted the

101	18
123	490

101	18
140	371
142	319

101	18
147	119
147	374

101	18
153	608

101	18
154	125
154	686
155	875
155	597

101	18
166	560

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plaintiff from the premises, and put his goods in the highway, and that he continues to detain the possession from plaintiff by force.

It is argued that the court erred in overruling a demurrer to this complaint, for the reason that it is not averred in the complaint, that the plaintiff had any right to the possession of the premises from which he was evicted in the manner described, and the defendant relies upon *Archey v. Knight*, 61 Ind. 311. It was there said that "It is only one 'having right to possession' of the lands in dispute who can maintain an action of forcible entry and detainer." It was also said in that case, that the action of forcible entry and detainer was not intended to try the title to lands, and that the plaintiff must prove he was in possession of the land before the forcible entry.

Adhering to what was said in the case relied on, it still remains to be determined, whether one having peaceable possession under a claim of right, has not also such "right to possession," within the meaning of section 5237, R. S. 1881, as will entitle him by the remedy there provided to be restored to the possession from which he has been deprived by force. By this section it is provided: "Any person who shall make unlawful or forcible entry into lands, and shall either peaceably or forcibly detain the same against any person having right to possession thereof, * * * may be ousted from such premises, and the possession thereof restored to the person entitled to the same, and damages for retention recovered on complaint by him made, in the same manner as provided in the case of tenants holding over."

By the common law of England prior to the enactment of the statute 5 Ric. II. 8, it was allowable to every person who was the owner of lands or tenements of which he was disseized, to regain possession by force, and without the aid of the law. "But," in the language of Sir William Blackstone, "this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain

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all persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim. So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons." 4 Black. Com., p. 148. This same commentator says, book 3, p. 179: "In case of deforcement, also, where the deforciant had originally a lawful possession of the land, but now detains it wrongfully, he still continues to have the presumptive *prima facie* evidence of right, that is, possession lawfully gained. Which possession shall not be overturned by the mere entry of another, but only by the demandant's showing a better right in a course of law." It will also be found on examination, that by the several statutes passed in England, it became the duty of the king's justices, on complaint of a forcible entry, to make inquiry concerning the same, and upon conviction to commit the offender "without inquiring into the merits of the title." This is substantially the purpose of the statute above set out, and where one is in the actual peaceable possession of lands, under a claim of right, such possession of itself gives him, as against any person entering or seeking to enter by force, upon a possession so had, the right to possession.

The statute providing a remedy for a forcible entry was designed to protect persons in the actual peaceable possession of premises, under a claim of right, from forcible eviction or unlawful invasion, whether such claim might in the end turn out to be well founded or not. Cooley Torts, 323.

Where a person is thus in actual peaceable possession, and such possession is forcibly and violently invaded, even though it be by the owner, who in the end has the right of possession, such person is entitled to the remedy provided by this statute. In such case, proof of actual, exclusive, peaceable possession under a claim of right will support the "right to possession," and entitle the person evicted to restitution.

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"Presumptively, a peaceable possession is always rightful." Cooley Torts, 326. If this is not the proper construction of the statute, then every tenant holding over, and every other person in actual possession, whose claim turns out not to be well founded, would be at the mercy of the landlord or other person having the better legal right, and might be expelled with whatever violence the owner might reasonably think fit to employ, thus substituting force and violence in the place of the orderly methods of the law. To prevent this was, as we have seen, the very purpose for which the forcible entry and detainer act was first enacted. Under this statute, the possession can not be changed against the person who actually has it, under claim of right, without the intervention of legal procedure.

It is suggested in argument that this view of the subject would expose the owner of a house to the inconvenience and delay of resorting to the tedious process of the courts to remove an intruder who should enter during his temporary absence from home. To this it may be said that the possession of the owner or rightful occupant continues in contemplation of law as well during his temporary absence as during his presence, and the entry of another during such absence does not divest the rightful possession of the owner or occupant, or give an intruder peaceable possession. A mere intruder upon the possession of another can not be in peaceable possession under a claim of right, nor would the intrusion of one upon the possession of another fall within the right to possession which the statute recognizes. In this case, it is averred that the plaintiff was in "the lawful and peaceable possession" of the premises in dispute, occupying it with his family as tenant from year to year. This indicates his possession and claim of right, and, whether well founded or not, it was sufficient as against a forcible eviction. *Olinger v. Shepherd*, 12 Grat. 462, 472; *Doty v. Burdick*, 83 Ill. 473; *Emsley v. Bennett*, 37 Iowa, 15; *Emerson v. Sturgeon*, 59 Mo.

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404; *Mitchell v. Davis*, 23 Cal. 381; *Warren v. Ritter*, 11 Mo. 354; *Bliss v. Johnson*, 73 N. Y. 529.

A bill of exceptions in the record recites, that at the proper time the defendant "introduced upon the witness stand one Benjamin Judy, the defendant, a competent witness, and by him offered to prove the following facts: 1. That the defendant was the owner in fee of the premises in controversy." This is followed by six additional propositions, which the bill states the defendant offered to prove by the witness. This is followed by like propositions made with respect to his other witnesses. These offers were, on objection made by the plaintiff, rejected by the court, and in this it is claimed the court erred. It does not appear that any questions were propounded to either of the witnesses, nor is there any statement of the particular facts which it is claimed either of them would have testified to. Nothing further appears except that a witness was in each case placed on the stand, whereupon the defendant submitted to the court a list of propositions or conclusions which it was proposed to establish by the testimony of each witness. This presents no question for our consideration. *Higham v. Vanosdol*, *post*, p. 160, and cases there cited.

Questions upon the refusal to admit evidence from a witness can only be saved by propounding to the witness some pertinent question, and, upon objection made, stating to the court, as it may direct, the testimony or facts which the witness would detail in answer thereto.

We have examined the evidence, and are of opinion that it sustains the verdict. The defence is based upon the theory that it was incumbent on the plaintiff to show a legal right to the possession as against the defendant, and that peaceable possession under a claim of right was not sufficient to entitle him to maintain his action. The instructions of the court were opposed to this view, and without examining them in detail we think they were not erroneous.

The judgment is affirmed with costs.

Filed April 9, 1885.

ON PETITION FOR A REHEARING.

MITCHELL, C. J.—In support of the petition for a rehearing, the learned counsel argue with much force and plausibility, that the transient possession of lands by a trespasser can neither be peaceable possession nor right of possession. Conceding this, it is nevertheless aside from the real question involved. It was averred in the complaint that the plaintiff was in the lawful and peaceable possession, and occupying the land in dispute with his family, claiming as tenant from year to year, and that the defendant with force and violence evicted him. This rebuts all presumption that he was a mere trespasser. What we hold in the principal opinion is, that this is the averment of such lawful peaceable possession, under a claim of right, as gives the person so in possession the "right of possession" as against a forcible invasion.

We agree with counsel that the complaint must show a right to possession, but that right, within the contemplation of the statute against forcible entry and detainer, is shown in this case by the averments above mentioned, and against a person so in possession, another may not set himself to be judge, and, having decided in favor of himself, execute his own judgment by force.

The circumstances under which an intruder may be expelled are not determined in the opinion, for the reason that no such case is presented by the record before us. Upon this subject see Cooley Torts, 323, 324.

We think no inference can be drawn from anything said in the principal opinion, that one who intrudes upon the possession of another may not be removed by the person rightfully entitled, even by force, if prompt action is taken to that end. This is nothing more than defending one's possession against intrusion from others.

It is claimed that the evidence does not sustain the verdict, because there is no proof that the plaintiff ever had possession of, or was evicted from anything but the house.

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The evidence tended to show that the plaintiff rented the house of, and was put in possession by, one VanReed. Whether he rented the ten acres of land belonging with the house is left to inference. There was no direct evidence on the point.

There was a general verdict for the plaintiff and an assessment of \$20 damages, and upon this the court rendered judgment, awarding a writ of restitution to the plaintiff for the house and land described in the complaint. The court was asked by motion to modify the judgment, so as to make it a judgment awarding damages only. This motion was overruled, and we think properly.

We think it is fairly inferable from the testimony, that the plaintiff had rented, and was in possession of, the land as well as the house. He testified as follows: "I moved into the property in controversy; it is a frame house of six rooms; there are ten acres of land; there is a barn, smoke-house and orchard." On cross-examination, he testified: "I told Mr. Judy I rented of Byron VanReed; he said, 'I want you to understand these are my premises and you have no right here.'" VanReed testified: "I had occupied premises; I put Citizen in dwelling; I reserved two rooms in house; had my things in them; * * * on the ten acres there was a dwelling, well, barn and smoke-house." The property is described in the complaint as consisting of a dwelling-house, out-buildings and ten acres of ground. The witnesses speak of it as the "property in controversy," the "premises," etc., and as against the verdict of the jury, we can not say there was no evidence that the plaintiff was in possession of the premises in controversy.

The petition for a rehearing is overruled.

Filed June 13, 1885.

Mason v. Mason.

No. 11,822.

MASON v. MASON.

101	25
139	40
101	25
145	298

DIVORCE.—*Notice by Publication.*—*Inhibition to Marry Within Two Years.*—

Marriage in Violation of Decree Voidable Only.—Where a divorce is obtained on notice by publication merely, and the decree, as required by section 1030, R. S. 1881, forbids the party obtaining such divorce to marry within two years, but such party, in violation thereof, does marry within that time, the marriage is unlawful and voidable, but, under the statute of this State, not absolutely void. It will become void, however, if, within the period inhibited, the decree is opened by the party against whom it was obtained.

MARRIAGE.—*Public Policy.*—*Construction of Statutes.*—When the marriage relation is once entered into, it is the policy of the law to uphold its validity by every reasonable intendment; and to sustain a marriage not inexorably void, a statute seemingly mandatory will sometimes be construed as merely directory.

SAME.—*Ratification of Unlawful Marriage.*—*Estoppel.*—In violation of a decree of divorce that she should not marry within two years from the time of its rendition, a woman married again, and after living with her husband four years brought an action for divorce, to which the defence was interposed that the marriage was unlawful because in violation of the decree of divorce from her former husband.

Held, that as it did not appear that the defendant was ignorant of the inhibition at the time of his marriage with plaintiff, and as he ratified the marriage by living with her two years after the inhibited period had expired, he was estopped from denying the validity of the marriage as a defence to the complaint.

From the Jay Circuit Court.

D. T. Taylor, J. M. Smith and T. Bailey, for appellant.

J. W. Headington and J. J. M. LaFollette, for appellee.

NIBLACK, J.—Complaint by Margaret J. Mason against George W. Mason, charging, in connection with the usual formal averments, that she was married to the defendant on the 12th day of July, 1880; that from that time until the 22d day of April, 1884, she lived with the defendant as his wife, treating him kindly and doing all in her power to make his home comfortable and pleasant; that on said last named day she was, in consequence of the defendant's continued

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abuse and his cruel and inhuman treatment of her, compelled to separate and live apart from him; wherefore a divorce and alimony were demanded.

The defendant answered, first, in general denial; secondly, admitting the marriage as charged, but averring that said marriage was in the first place, and had continued to be, void for the following reasons: That, on the 18th day of February, 1871, the plaintiff, at the county of Jay and State of Indiana, intermarried with one John Butcher; that, on the 20th day of January, 1880, she filed her petition in the Jay Circuit Court praying for a divorce from the said Butcher; that afterwards, at the March term, 1880, of said Jay Circuit Court, at a hearing of said cause, it was ordered, adjudged and decreed that the plaintiff be thereafter forever divorced from said Butcher; that, it appearing to the court that the only notice which had been given to Butcher of the pendency of the petition for a divorce against him was by publication in a newspaper, it was further ordered, adjudged and decreed that the plaintiff should not intermarry with any other person for a period of two years from the time of the rendition of said decree of divorce; that in violation of law, and of the inhibition contained as above in said decree of divorce, the plaintiff did, on said 12th day of July, 1880, at the county of Blackford, in this State, intermarry with the defendant, as charged in the complaint; that at the time of the rendition of such decree of divorce, the said Butcher was, as he still continued to be, in full life; that the plaintiff and defendant had no children living as the fruit of their said pretended marriage.

A demurrer was sustained to this second paragraph of answer; and the circuit court, after hearing the evidence, made a finding that the plaintiff ought to be divorced from the defendant, and was entitled to recover the sum of \$100 for alimony, and decreed accordingly. The only complaint made here of the proceedings below is, that the circuit court erred in sustaining the demurrer, as above stated, to the second paragraph of the answer.

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It was provided by section 6 of the act of March 10th, 1873, Acts 1873, p. 107, which is still in force, R. S. 1881, section 1030, that "Parties against whom a judgment of divorce shall hereafter be rendered, without other notice than publication in a newspaper, may, at any time within two years after the rendition of such judgment, have the same opened, and be allowed to defend as well on the granting of the divorce as in relation to the allowance of alimony and the disposition of property; and until the expiration of said two years, it shall not be lawful for the party obtaining such divorce to marry again; which shall be stated in the decree of the court."

Several of the States have statutes either similar or somewhat analogous to the foregoing provision, but we regret to find that there is a manifest want of harmony between many of the cases which have arisen under that class of statutes. The decisive weight of authority, however, appears to us to be in favor of the conclusion that a marriage, contracted in violation of such an order of court as that set up in defence in this case, is not absolutely void unless declared to be so by the statute under which the order was made. The first section of the act of 1873, *supra*, declares certain marriages to be wholly void, but neither that nor any other section of the various statutes of this State characterizes such a marriage as the one in question as absolutely void.

There are many cases in which a marriage may be unlawful without being void, such as the want of proper authority in the person who solemnized it, some irregularity in the manner of its solemnization, some merely personal or temporary restriction imposed, and the like: "A marriage if legal must be valid, but a valid marriage may be illegal." Stewart Marriage & Divorce, section 5. The decree of divorce between the appellee and Butcher dissolved the marriage relation between them, subject only to Butcher's right to have the decree reopened at any time within two years after its rendition, but upon grounds of public policy, as well as in justice to

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Butcher, it was declared to be unlawful for the appellee to marry again so long as his right to have the decree opened continued, and that declaration was not only authorized, but, as has been seen, was required by law. Her marriage, therefore, with the appellant, at the time it was entered into, was in contempt of the authority of the court which decreed to her a divorce from Butcher; it was also contrary to law, and hence *unlawful*. But no penalty is attached to, or forfeiture imposed as a consequence of, such a violation of law. When the marriage relation is once entered into, it is the policy of the law to uphold its validity by every reasonable intendment. *Park v. Barron*, 20 Ga. 702. Statutes seemingly mandatory will sometimes be construed to be directory only, when necessary to sustain the validity of a marriage not inexorably void. Upon the facts averred, therefore, we regard the marriage between the appellant and appellee as having been voidable merely, and hence not void.

If Butcher had, within the time reserved to him, caused the decree of divorce against him to be opened, that would have annulled, and rendered void, the appellee's marriage with the appellant. If the appellant intermarried with the appellee in ignorance of the inhibition resting upon her, he might, doubtless, within a reasonable time have procured an annulment of the marriage. But it is not averred that he was ignorant of this inhibition, and we must, hence, assume that he was not ignorant of it. The answer impliedly admitted that the appellant, for more than two years after the decree against Butcher had become absolute, and with full knowledge of all the facts, had lived and cohabited with the appellee as her husband, and that the separation did not result from any supposed irregularity in their marital relations. The facts thus admitted amounted to an unconditional ratification of the marriage of the appellant with the appellee, and to a full recognition of its validity. The appellant was, consequently, estopped from setting up the unlawfulness of the marriage in the first instance, as a defence to the complaint against him

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for a divorce. Stewart, *supra*, sections 79, 152, 153, 154, 415, 417, 424, 432; 1 Bishop Marriage & Divorce, sections 287 and 287a; 2 Bishop, *supra*, section 264; *Tefft v. Tefft*, 35 Ind. 44; *Teter v. Teter*, 88 Ind. 494; *Harman v. Harman*, 16 Ill. 85; *Van Voorhis v. Brintnall*, 86 N. Y. 18 (40 Am. R. 505); *Hynes v. McDermott*, 91 N. Y. 451 (43 Am. R. 677); *Catterall v. Sweetman*, 1 Robertson Ecclesiastical Cases, 304.

The judgment is affirmed, with costs.

Filed March 21, 1885.

No. 11,457.

THE STATE, EX REL. LOWE, *v.* LAUGHLIN, AUDITOR.

RAILROAD.—*Township Tax in Aid of Construction.—Suspension of Collection.—Power of County Board.—Auditor and Treasurer.*—Where a township tax to aid in the construction of a railroad has been duly levied and placed upon the tax duplicate for collection, the board of commissioners of the county has no power, under section 4069, R. S. 1881, or any other statute of this State, to make an order directing the county auditor and treasurer to suspend the collection of such tax, and such order, if made, is null and void for any purpose.

From the Bartholomew Circuit Court.

F. Winter, for appellant.

G. W. Cooper, *N. R. Keyes* and *S. Stansifer*, for appellee.

HOWK, J.—On the verified complaint of the appellant's relator, an alternative writ of mandate was issued in this cause, directed to the appellee as the auditor of Bartholomew county. The appellee demurred to the alternative writ upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court; and the relator declining to amend or plead further, judgment was rendered against him for appellee's costs.

The relator has appealed to this court and has assigned as error the decision of the circuit court in sustaining appellee's demurrer to the alternative writ of mandate.

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It was alleged in substance, in the alternative writ of mandate, that on the 14th day of March, 1882, a petition signed by twenty-five or more freeholders of Columbus township, in Bartholomew county, of whom the relator was one, was presented to the board of commissioners of said county, asking that said Columbus township should aid in the construction of the Columbus, Hope and Greensburg Railroad, by taking stock therein to the amount of seventy thousand dollars; that said board took said petition under advisement and thereupon ordered that an election be held in said township to determine whether such aid should be extended to said railroad; that said election was held on the 22d day of April, 1882, and resulted in favor of such aid being extended; that thereafter, on the 12th day of June, 1882, at their regular June session, the board of commissioners of said county ordered that a tax of one per centum be levied on the taxable property of said Columbus township for the year 1882, to aid in the construction of said railroad by said township taking stock therein according to the prayer of said petition; that thereafter the auditor of said county prepared the tax duplicate of said county for the year 1882, and placed thereon, as against the taxpayers of Columbus township, as part of the taxes to be paid by them for said year, the said levy of one per centum so made by said board of commissioners, for the purpose of aiding in the construction of said railroad, which said levy amounted to the sum of \$36,850.50, and said duplicate containing said tax was thereupon delivered to the treasurer of said county, to be collected in regular course, and it thereupon became the duty of the treasurer to collect one-half of said amount on or before the 3d Monday of April, 1883, and the other half on or before the 1st Monday of November, 1883; but that thereafter on the 3d day of March, 1883, upon a petition filed by certain voters and taxpayers of said Columbus township, the board of commissioners of said county, without notice to the relator or any of the petitioners for the extension of aid to such railroad, assumed to and did order

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that "the auditor and treasurer of said county be authorized, according to the acts of 1873 and in force March 11th, 1875, to suspend the collection of taxes levied by said board at their June session, 1882, in Columbus township, to aid in the construction of said railroad, until said company has expended an amount of money in the actual construction of said railroad in Columbus township, as required by section 4069 of R. S. 1881," and it was further ordered that the auditor place the said railroad tax separately on the tax duplicate of Columbus township, and carry the same forward on the duplicate until further ordered by the board; and that thereupon the then auditor of said county, pursuant to said order, deducted the amount of said railroad tax from the tax duplicate of said Columbus township and left no part thereof in the hands of said treasurer for collection, and in consequence no part of the same has been collected.

Thereafter, at its regular June session, 1883, said board of commissioners ordered that a tax of one per centum upon the taxable property of Columbus township for the year 1883, be levied for said year 1883, being the remaining one-half of said sum of \$70,000 voted by said township to aid in the construction of said railroad.

That said board of commissioners, at their September session, 1883, ordered that their aforesaid order of March 3d, 1883, should be cancelled and rescinded, and that the tax referred to in said order should stand for collection as though said order had never been made, except that all acts and proceedings done under said order should be valid, and also that it was not intended by said order to vary or change the proceedings of the auditor and treasurer in suspending the collection of said tax until said road is permanently located and work done by said railroad company as required by law.

It was further shown that said railroad had been permanently located in said Columbus township long before the time when the auditor of the county placed the instalment of the tax levied for the year 1882 upon the tax duplicate of

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said county for said year 1882, and that said railroad was so located, and in process of actual construction in good faith, when said tax was so as aforesaid ordered to be suspended by the board of commissioners, and in pursuance thereof withdrawn from collection by said county auditor. It is further shown that the railroad company had diligently proceeded in the construction of said railroad upon the line of its permanent location, and theretofore, on the 10th day of December, 1883, had completed and fully constructed said railroad throughout its entire length, from the city of Greensburg, in Decatur county, by way of the town of Hope, in Bartholomew county, to the city of Columbus, in said Columbus township, Bartholomew county, so that the same then was, and ever since has been, ready for use, and that trains of cars had passed and could pass over the entire length thereof, and that in and about such construction thereof said railroad company had expended upon the part of said railroad in Bartholomew county a sum of money largely in excess of the sums of money voted by Columbus township and other townships of said county to aid in the construction of said railroad, and that by reason of said facts it was the duty of the auditor of said county to place upon the tax duplicate of said county for the year 1883, the said instalment of the tax voted in aid of said railroad, which had been levied upon the taxable property of said Columbus township for the year 1882, and which had, as aforesaid, been withdrawn from collection, as well as the instalment of said tax which had been levied as before stated for the year 1883, and to include both said instalments in the amount of taxes to be collected by the treasurer of said county upon the tax duplicate for the year 1883; that the relator, on the 20th day of December, 1883, notified the appellee Laughlin, who was the auditor of said county, that he was a freeholder and taxpayer of said Columbus township, and one of the petitioners for the extension of aid to said railroad, and that said railroad had been and then was fully constructed and ready for use throughout its entire length, and that in

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such construction there had been expended in Bartholomew county a sum in excess of the aid voted by said township, and thereupon demanded of said Laughlin that as auditor of said county he should place both said instalments of tax upon the duplicate of said county for the year 1883, and deliver the same to the treasurer of the county for collection.

It is shown that said auditor declared that he would not enter upon the tax duplicate for said year 1883 any part whatever of the tax so levied in aid of said railroad for the year 1882, and which had, as aforesaid, been withdrawn from collection, as a tax to be collected as other taxes upon said duplicate, but that he would enter the same upon said duplicate in a separate column as a tax, the collection of which had been suspended, and which was to be carried forward upon the duplicate without collection until its collection should be ordered by the board of commissioners of said county.

It is further shown that said auditor has nearly completed said tax duplicate, and that while he has entered thereon, and extended as a tax to be collected in ordinary course, the one-half of said tax levied by the board of commissioners at their June session, 1883, and declares that he knows of no reason why the same should not be collected, he has placed the instalment of the tax levied at the June session, 1882, in a separate column, and stated upon the duplicate that it was a suspended tax, which was not now to be collected.

The mandate of the writ was that the auditor should place upon the tax duplicate for the year 1883 the entire amount of the instalment of said tax levied at the June session, 1882, and extend the same as against the taxpayers of said Columbus township as a tax to be collected from them by the treasurer of said county in ordinary course, and that in so doing he omit any and all statements that said instalment of tax had been suspended or was not to be collected, or that failing so to do he should show cause why the court should not award against him its peremptory writ of mandate.

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The validity of the railroad aid tax, mentioned in the alternative writ, is in no manner called in question in the case at bar. We may properly say, however, that all questions in relation to the validity of such tax were settled, in favor of the tax, by the opinion and judgment of this court, in *Irwin v. Lowe*, 89 Ind. 540.

The first question discussed by the relator's counsel, in his brief of this cause, relates to the alleged invalidity of the order of the board of commissioners of Bartholomew county; made on the 3d day of March, 1883. This order authorized the county auditor and county treasurer to suspend the collection of the railroad aid tax, theretofore levied by the county board and then upon the tax duplicate for collection, until the railroad company had expended an amount of money in the actual construction of the railroad in Columbus township, as required by section 4069, R. S. 1881. It is earnestly insisted by the relator's counsel, that the section of the statute, invoked by the county board, did not authorize the board to make such an order, and did not authorize the auditor and treasurer of the county, with or without such an order of the board, to suspend the collection of the railroad aid tax theretofore levied and then on the tax duplicate for collection. In support of his position, the learned counsel has vigorously assailed such section of the statute, upon the ground that by its phraseology and grammatical construction, the section was not intended to apply to cases where stock might be taken, or donations might be made, by any township after the section took effect and became a law, on the 11th day of March, 1875. We do not find it necessary to consider and decide this point in the case now before us, and therefore we express no opinion in regard to it.

It is clear to our minds that upon the facts stated in the alternative writ of mandate, admitted to be true as the case is now presented, the action and orders of the board of commissioners, in attempting to suspend the collection of the

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railroad aid tax, levied in June, 1882, and placed upon the tax duplicate for collection, and the action of the county auditor under such orders, were wholly unauthorized by the provisions of section 4069, or of any law of this State in force at the time, and were therefore null and void for any purpose. The collection of the taxes levied in June, 1882, in aid of the railroad, and placed upon the tax duplicate, was not lawfully suspended; and if, from any cause, such taxes or any part thereof were not paid by the taxpayers, or any of them, at the times fixed by law for the payment of taxes, they became delinquent as other taxes, by reason of such non-payment, and ought to have been carried forward and charged, as delinquent taxes, upon the tax duplicate of the next succeeding year for collection. It is shown by the alternative writ that the taxes were levied by the county board in strict conformity with the provisions of section 4056, R. S. 1881, in force since May 12th, 1869, to wit: "One per centum upon the real and personal property in the township," in June, 1882, and the residue thereof at the June session of the following year. There is no statutory provision which prohibits the collection of both the instalments of taxes, in one and the same year, where, as in this case, the taxes were levied in conformity with the statute, but the first instalment was not collected at the time it ought to have been collected.

We are of opinion, therefore, that the court clearly erred in sustaining the appellee's demurrer to the alternative writ of mandate.

The judgment is reversed with costs, and the cause is remanded with instructions to overrule the demurrer to the alternative writ, and for further proceedings not inconsistent with this opinion.

Filed March 14, 1885.

The State, *ex rel.* Waymire, v. Shay.

No. 11,942.

THE STATE, EX REL. WAYMIRE, v. SHAY.

OFFICE AND OFFICER.—*Township Trustee.—Election.—Certificate of.*—The right to the office of township trustee is ultimately decided by the ballots, and not upon the certificate of election, and the eligible candidate receiving the highest number of votes cast is entitled to the office.

ELECTION.—*Quo Warranto.—Right to Try Title to Office.*—A defendant in a *quo warranto* proceeding is not bound to confine the controversy to the single question as to the effect of the certificate of the election officers, but has a right to assert, by answer, his title to the office, and to show that he was the eligible candidate who received the highest number of votes; nor is he obliged, when proceeded against by an information in the nature of a *quo warranto*, to yield up the office and resort to the statutory remedy for trying title to office, where a "re-count" of the votes shows that he was duly elected.

SAME.—*Evidence.—Ballots.*—It is proper on the trial of an issue joined on an information in the nature of a *quo warranto*, to try the title to an office, to introduce in evidence the ballots cast at the election.

SAME.—*Entries of Public Officers.*—It is proper to give in evidence the entries of public officers made in the discharge of public duties, and this rule applies to an endorsement by the inspector of the election made upon a bag containing ballots.

SAME.—*"Re-Count" of Votes.*—The statute authorizes the circuit court to order a "re-count" of ballots cast at an election.

SAME.—*Evidence.—Certificate of Commissioners Appointed to Recount Ballots.*—The certificate of the commissioners appointed by the circuit court to recount the ballots cast at an election is competent evidence.

From the Madison Circuit Court.

M. S. Robinson and *J. W. Lovett*, for appellant.

H. D. Thompson and *T. B. Orr*, for appellee.

ELLIOTT, J.—The relator filed an information in the nature of a *quo warranto*, claiming a right to the office of township trustee of Duck Creek township, Madison county. It was alleged in his petition, or information, that he had been duly elected, was eligible, and had received the certificate of election and had qualified by giving bond and taking the oath of office. The first paragraph of the appellee's answer is the general denial, and the second is a special paragraph, alleging

101	36
136	70
149	291
150	430

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that the relator and the appellee were the only candidates for the office in controversy, that the latter was eligible to the office, that he received one hundred and seven of the votes cast at the election, and that the relator received one hundred and six; that by mistake of the election officers one hundred and fourteen of the votes were counted for the relator and only ninety-eight were counted for the appellee; that the appellee instituted proceedings under the statute to have the votes again counted; that notice was given, and by agreement Thomas J. McMahan, John W. Pence and DeWitt C. Chipman were appointed commissioners to recount the ballots; that they did recount them and did ascertain that a mistake was made in the first count, and that the appellee, and not the relator, had received the highest number of votes cast at the election.

We regard this answer as sufficient. If the appellee did actually receive the highest number of votes cast, he, and not the relator, was entitled to the office. The certificate of the election officers was not conclusive evidence of the relator's election, but was only *prima facie* evidence of that fact. American Law of Election, sections 219 and 221. An election is ultimately decided, not by the certificate of election, but by the ballots, and the eligible candidate who received the highest number is entitled to the office. *Dobyns v. Weadon*, 50 Ind. 298; *Hadley v. Guttridge*, 58 Ind. 302; *Reynolds v. State, ex rel.*, 61 Ind. 392.

As the certificate of the election officers conferred only a *prima facie* right to the office, the appellee was entitled to overthrow it by showing that it had been ascertained, in the method prescribed by law, that the certificate was founded upon an unsubstantial basis, and that the appellee, and not the relator, had received the highest number of votes. The "recount" made under the provisions of the statute, and the certificate issued by the commissioners, disclosed the fact that the certificate did not entitle the relator to the office claimed, and the only way in which the question could be authoritatively settled was by a judicial investigation.

The State, *ex rel.* Waymire, v. Shay.

The appellee had a right to vindicate his title to the office by showing that he did in fact receive the highest number of votes cast. A defendant in such a proceeding as this may, by answer, assert his claim to the office which the relator seeks to secure. *Elam v. State, ex rel.*, 75 Ind. 518. The appellee was not bound to confine the controversy to the single question of the force and effect of the certificate of the election officers, but had a right to go into the merits of the controversy, and have the question of the title to the office finally settled. The filing of the information was a challenge to the appellee to show his right to the office, and it devolved upon him to meet the claim of the relator by all such defences as he possessed. It may well be doubted whether if the appellee had omitted to set forth his title to the office he would not have been concluded from ever afterwards asserting it. It was, at all events, proper to settle the entire controversy in one action.

The appellee was not obliged to resort to the statutory method of contesting the relator's title to the office, but had a right to defeat the relator by showing that he was not elected to the office. It has often been held that it is proper to try title to an office by *quo warranto*, even where a statutory method is prescribed. *State, ex rel., v. Gallagher*, 81 Ind. 558; *State, ex rel., v. Adams*, 65 Ind. 393; *Reynolds v. State, ex rel.*, 61 Ind. 392; *Barkwell v. State, ex rel.*, 4 Ind. 179; *Huddleston v. Pearson*, 6 Ind. 337. If it be true that the appellee might have commenced proceedings by an information to settle his right to the office, then, surely, it must be true that when an information is filed against him assailing his title, he may defend by showing the grounds upon which his title rests. Whatever form the contest may assume, the pivotal question is, Who received the highest number of votes? and of this fact the original ballots cast by the voters is the best evidence. *Reynolds v. State, ex rel., supra.*

It was proper to produce on the trial the original ballots, and if it appeared from them that the appellee was legally chosen, it was the duty of the court to award him the office.

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The statute does not contemplate a trial of the force and effect of the certificate merely, but contemplates a trial of the general question, Who is legally entitled to the office? for it provides "that judgment shall be rendered upon the rights of the parties." R. S. 1881, sec. 1136. A judgment upon the rights of the parties can not be rendered unless it is ascertained who is entitled to the office, and this can not be done without ascertaining which of the candidates actually received the highest number of votes.

There was no error in permitting Andrew J. Behymer, the inspector of the election, to testify that he placed the ballots and election papers in a bag, sealed it and delivered it to the clerk. It was his duty to do this, and it was competent to prove that he had performed this duty. Nor was there any error in permitting him to identify the bag and papers. It was unquestionably competent to permit the clerk, or his deputy, to testify as to when and from whom they received the bag, and to identify it as the one delivered to them by the inspector.

The fact that the bag had been opened, and the ballots counted by the commissioners appointed by the court, did not render the ballots incompetent evidence. It can not be presumed that these officers, or any others, acted illegally or corruptly. It is a familiar rule that officers are presumed to have faithfully performed their duty, and that the presumption is against bad faith and dishonesty. It was incumbent upon the relator to show some facts impeaching the acts of the officers in order to entitle him to insist upon a rejection of the ballots, and here nothing of the kind was shown.

Entries or papers written by public officers in the course of the performance of official acts are competent evidence. It was the duty of the inspector of the election to make an endorsement upon the bag containing the ballots and election papers, and it was competent, under the rule just stated, to read this endorsement in evidence. Upon the same principle it was competent to read in evidence the affidavit of the inspector made in accordance with the provisions of the statute.

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That the ballots were competent evidence is apparent from what we have said in discussing some of the other questions.

There was no error in permitting the bond executed by Patrick Shay, the appellee, to be read in evidence; it tended to show that he had qualified according to law, and to prove that he had not abandoned the office.

We perceive no valid objection to the ruling permitting the entry of the order directing a "re-count" to be made. The order was one which the statute authorized the court to make, and tended to show that the persons who recounted the ballots had legal authority to examine them. It also tended to show that the bag containing them was opened by persons duly authorized, and to rebut the inference, which might otherwise have arisen, that they were improperly examined after they had been sealed up and delivered to the clerk.

The court permitted the certificate of the commissioners appointed by the court to make the "re-count" to be introduced, and this ruling is attacked upon the ground that such a certificate is only evidence in case contest is made under the statute. We can not adopt the construction of the statute for which the relator contends. The certificate may be used in a contest under the statute, but there are no limiting or restraining words, and we think that, as it is an instrument made in accordance with law by persons duly authorized, it is competent evidence in any legal contest between the parties, no matter what form the contest may assume. The leading purpose of the statute is to enable a candidate to ascertain, by a "re-count" of the ballots, whether or not the election officers did their duty and correctly counted the ballots. When a "re-count" is made, it is the duty of the commissioners to make a certificate showing the result of their examination, and the certificate is, therefore, an official document exhibiting the result of their examination. It seems clear that, as they had authority to make the examination, and as they were charged with the duty of issuing the certificate, it must be evidence in any legal contest for possession of the office. The

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statute, R. S. 1881, sec. 4741, provides that "Such certificate, or the record thereof, may be used as evidence of the facts therein recited upon the trial of any contest of said election between said candidates," and this general language will apply quite as well to a contest by information as to a contest by the statutory method. If we adopt a different view, we should render the certificate useless except in cases where the statutory procedure was adopted, and this would lead to evil results. If the contest is a legal one, the certificate must be deemed evidence, or we shall have an instrument dependent for its force, not upon the merits of the controversy, but upon the form of the remedy. Another evil consequence, which would result from an adoption of the relator's views, would be that an instrument forming an essential part of the procedure provided by law must be excluded, and its place supplied by parol testimony in all proceedings to contest the right to an office by an information in the nature of a *quo warranto*. It is usual to put in evidence all, and not merely a part, of the papers in a legal investigation, and there is no reason why this practice should not prevail here. If it be held that the certificate is not evidence, then a complete explanation of the opening of the bag containing the ballots could not be made, and the "re-count" itself could not be satisfactorily explained. The ultimate result of such a doctrine as that for which the relator contends, would be that if a "re-count" was had, and the candidate asking it was proceeded against by information, he could not have the benefit of the "re-count." As the election may be contested by information, it must follow that what would be competent evidence if another remedy had been adopted, must also be evidence where the remedy adopted is by information.

We think that the finding of the court is well supported by the evidence.

Judgment affirmed.

Filed Feb. 24, 1885.

Scott et al. v. Board of Commissioners of Vermillion County.

No. 12,199.

SCOTT ET AL. v. BOARD OF COMMISSIONERS OF VERMILLION
COUNTY.

PRACTICE.—*Appeal.*—*Record.*—*Motion to Strike Out Pleadings in Trial Court.*
—Where a motion to strike out part of a paragraph of complaint is sustained, such motion must be made a part of the record by bill of exceptions or order of court, in order to be available in the Supreme Court on appeal.

GRAVEL ROADS.—*Bond for Preliminary Expenses.*—A board of county commissioners have no authority or power to act, or take any steps whatever, in a proceeding for the establishment and construction of a free gravel road, under the provisions of the statute (R. S. 1881, sections 5091, 5092), until a bond for the expenses of the preliminary survey shall be filed. The purpose of the statute is to relieve the county, ultimately, from the payment of the expenses incident to the proceedings, in the event that the improvement prayed for is not finally ordered by the board.

SAME.—*Revocation of Order Establishing Road.*—*Estoppel.*—While proceedings are still pending before the board, it has authority, for good cause, to revoke an order establishing the road; and if this is done at the instance of the signers of the bond, they are estopped from denying the legality of the revocation, in a suit on the bond against them. The revocation of the order is, in effect, the same as if no such order had ever been made, and renders the signers of the bond liable on the bond for the expenses they thereby obligated themselves to pay. It is not necessary that all the petitioners unite in a request for a revocation. If any of them are aggrieved by the revocation, they have a right to appeal therefrom. Others, who did request the revocation, can not complain in their behalf, and are estopped from complaining for themselves afterwards.

From the Vermillion Circuit Court.

J. Jump and C. W. Ward, for appellants.

M. G. Rhoads, for appellee.

COLERICK, C.—This action was brought by the appellee upon a bond executed by the appellants. The complaint consisted of two paragraphs, which were substantially alike. In each it was averred, in substance, that on the 22d day of July, 1880, the appellants and others presented to the board of commissioners of Vermillion county, a petition for the establishment and construction of a free gravel road, in said

101	42
140	348

101	42
148	140

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county, and filed with said petition the bond upon which this action was founded, a copy of which was made a part of each paragraph of the complaint. The condition of the bond was that the appellants would pay to said county of Vermillion the expenses of the preliminary survey of the proposed road, if its construction was not finally ordered by said board. It was then averred that said board accepted the bond, and took jurisdiction of the matter, and ordered said preliminary survey to be made, as prayed for, and that it was afterwards made and reported to the board, who thereupon entered upon its record an order that the improvement be made, and appointed a committee to apportion the expenses of the improvement upon the lands benefited thereby, and that said committee afterwards made said apportionment and reported the same to the board, but before any action was taken thereon, the board, at the written request of the petitioners for the road, and all of the appellants, revoked and set aside its order for the making of the improvement and the proceedings thereunder, and made no order thereafter for the improvement, and that the expenses of said proceeding, including said preliminary survey and report thereof, amounted to \$231.85. It was also averred that all of the proceedings of the board and all the steps taken by the petitioners in the matter, including the petition, bond and all jurisdictional facts giving said board authority to act, were regular and proper, both in form and substance. Wherefore the appellee prayed judgment on said bond for \$250, being the amount of said expenses, etc.

The only apparent difference, in substance, between the two paragraphs of the complaint is, that in one paragraph it was averred that the board set aside its order and proceedings for the improvement at the instance of *the* petitioners and the appellants, while in the other it was alleged that it was done at the request of "*most* of said petitioners" and the appellants; and in one paragraph the aggregate amount only of all the expenses incurred in the proceedings was mentioned, while in the other the expenses to the time the board ordered

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the improvement to be made, and the expenses thereafter created, were separately stated.

A motion by the appellants to strike out a part of the second paragraph of the complaint was sustained by the court. The clerk has copied into the transcript what purports to be the motion so made by the appellants, but as it was not embodied, with the ruling of the court thereon, in a bill of exceptions, nor made a part of the record by an order of court, it constitutes no part of the record in this cause, and is improperly in the transcript, and for that reason can not be examined or considered by us for the purpose of ascertaining what part of the pleading was stricken out by the court. See *Berlin v. Oglesbee*, 65 Ind. 308; *Dunn v. Tousey*, 80 Ind. 288; *Klingensmith v. Faulkner*, 84 Ind. 331; *Peck v. Board, etc.*, 87 Ind. 221; *Saunders v. Heaton*, 12 Ind. 20.

As there is nothing legally before us showing what part of the pleading was stricken out, we must consider it with reference to its sufficiency, as we find it in the record, the same as if no such motion was made. A separate demurrer to each paragraph of the complaint was overruled, and the appellants refusing to answer over, final judgment on demurrer was rendered against them, in favor of the appellee, for \$164, from which they appeal, and assign as errors the rulings of the court upon said demurrers.

The liability of the appellants, if any existed against them, on the bond, which is the foundation of the action, was created and is to be determined by the provisions of the statute under and by virtue of which the bond was executed. The statute, Acts 1877, p. 82, provides:

“SECTION 1. The board of commissioners of any county in this State shall have power, as hereinafter provided, to lay out, construct or improve, by straightening, grading, or draining in any direction required to reach the most convenient and sufficient outlet, paving, gravelling, or macadamizing any State or county road, or any part of such road, within the limits of their respective counties.

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"SEC. 2. Upon the presentation of a petition stating the kind of improvement prayed for, and the points between which the same is asked, signed by five or more of the landholders whose lands will be assessed for the cost of the improvement, and the filing of a bond, signed by one or more responsible freeholders, to whom the petitioners shall be responsible *pro rata*, conditioned for the payment of the expenses of the preliminary survey and report, if the proposed improvement shall not finally be ordered, the board of commissioners shall appoint three disinterested freeholders of the county as viewers, and a competent surveyor or engineer to proceed, upon a day to be named by the commissioners, to examine, view, lay out or straighten said road, as in their opinion public convenience and utility require," etc. The above sections also appear in the Revised Statutes of 1881, as sections 5091 and 5092.

A board of commissioners have no authority or power to act or take any steps whatever in a proceeding for the establishment and construction of a free gravel road, under the provisions of the statute above set forth, until a bond, as therein required, is first executed and filed. The obvious purpose of the statute in requiring such a bond to be given is to relieve the county, ultimately, from the payment of the expenses incident to the proceeding, in the event that the improvement prayed for is not finally ordered by the board to be made.

The only objection urged by the appellants in this court to the sufficiency of the complaint is that it affirmatively shows that no cause of action existed against them upon the bond which they so executed, as it appears by the averments in each paragraph of the complaint that the board of commissioners directed, by its order, the improvement to be made. It is insisted by the appellants that the order so made resulted in satisfying the condition of the bond and discharging its makers from any liability thereon, and that the sub-

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sequent action of the board in revoking or setting aside said order was without authority of law, and, therefore, void. If the proceeding in which the order was made was not pending before the board at the time of the revocation of the order, but had been finally determined before that time, then no power would have existed in the board to review or revoke said order, and its action in attempting to revoke it would have been void. But it clearly appears by the averments in each paragraph of the complaint, that the proceeding was regularly and legally pending before the board at the time the order was revoked, and that its revocation was at the instance and request of the appellants. Under such circumstances, we think, the appellants should be and are precluded and estopped from assailing the legality of the action of the board in revoking said order, or questioning the power which they invoked the board to exercise. If the board of its own volition, and without sufficient cause, had revoked the order, a different question from the one decided would have been presented for our consideration. The revocation of the order was, in effect, the same as if no such order had ever been made, and rendered the appellants liable on their bond for the expenses which they obligated themselves, by the bond, to pay.

It is further insisted by the appellants that unless all of the petitioners united in the request for the revocation of the order, the board had no power to revoke it. The petitioners and all other persons interested in the proceeding were before the board, and if any of them felt aggrieved at the decision of the board, they had the right to appeal therefrom to the proper court. If any error was committed by the board in revoking the order, it was committed at the instance of the appellants and in their favor, and, therefore, they can not complain of such error. See *Barker v. Hobbs*, 6 Ind. 385; *Robertson v. Caldwell*, 9 Ind. 514; *Minot v. Mitchell*, 30 Ind. 228; *Buskirk Pr.* 119.

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The demurrers were properly overruled, and the judgment of the court below should be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellants.

Filed March 18, 1885.

No. 11,851.

BRISTOR ET AL. v. BRISTOR.

HUSBAND AND WIFE.—*Decedents' Estates.*—*Rents from Wife's Land, Husband's Liability for.*—*Trusts.*—*Acquiescence.*—Where a husband, during a long series of years, receives and applies the rents of the wife's real estate to the common use of the family, without objection by her, and under circumstances showing no intention on the part of either that he shall be charged therewith, she can not, after his death, maintain a claim therefor against his estate; nor can she, where such rents have been invested by the husband, with her knowledge, in other real estate, for the benefit of the family, after acquiescing in such use for a period of more than twenty years, claim him as her trustee to the extent of such investment, but she will be deemed to have waived all right to follow such rents into the property.

From the Marion Circuit Court.

L. Ritter, E. F. Ritter and B. W. Ritter, for appellants.

H. J. Milligan, R. Hill and R. N. Lamb, for appellee.

FRANKLIN, C.—Appellants William A. Bristor and Elizabeth Hamlet, as the only children and as heirs of Samuel M. Bristor, deceased, sued Esther Bristor, their mother, and the widow of said deceased, for two-thirds of the rent for the home residence occupied by the widow.

The appellee and said Samuel M. Bristor were married in 1842, and he died in 1879 intestate. Appellee was the daughter of one Christopher Kellum, deceased, and in July, 1842, she and her brother, John Kellum, agreed upon a partition among themselves of all the real estate of which their father died seized, they being his only heirs. Part of the real estate embraced in this agreement was a lot on Washington street,

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adjoining the property upon which the building known as the "Vance Block" is now situated, in the city of Indianapolis. By this agreement, this lot was to be set off to appellee, the deed to which from said John Kellum was executed to her and her husband jointly. Her husband afterwards built a store-room upon this property, which building is yet standing. The husband was a carriage maker, and an industrious and economical man. In 1858 he bought a lot on Delaware street, in Indianapolis, taking the deed in his own name, and erected a dwelling-house thereon, in which house he resided until his death, and this is the property in controversy. After the death of Samuel M. Bristor, in 1879, appellee was appointed administratrix of his estate, and filed a claim against said estate, alleging that deceased had collected the rents of the Washington street property in a large sum, which she was entitled to recover against his estate, which was disallowed by the court. An appeal was taken to this court, and the judgment reversed for error in the admission of testimony. The case is reported as *Bristor v. Bristor*, 82 Ind. 276.

Another trial was had, resulting in favor of appellee, who recovered a judgment for \$5,000. The case was again brought to this court, and the judgment again reversed, upon the ground that the evidence showed no right of recovery in appellee, and is reported as *Bristor v. Bristor*, 93 Ind. 281.

While that case was last pending in the court below, the appellants each brought suit against appellee to recover their respective portions of the rent of the Delaware street property, of which they each claimed to have one-third, inherited from their father. No question is made as to the Washington street property; appellee's title to that is not disputed. By agreement these two actions for rent were consolidated.

Appellee filed an answer alleging a resulting trust in her favor in the Delaware street property, and setting up title in herself. She also filed a cross complaint containing, substantially, the same averments, asking to quiet her title to that property, basing her claim upon averments that the

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Delaware street property was purchased and improved with her separate property, to wit, the rents collected from the Washington street property.

Demurrers were filed to the several paragraphs of the answer and cross complaint, and were overruled, and the issues were then closed by reply and answer to cross complaint.

By agreement of parties, this cause and the said claim against the estate, which appellants had been admitted to defend, were tried together, the same evidence being given for both. There was a trial by the court, a finding against appellee upon her claim against the estate, and in her favor upon her cross complaint in the other action, quieting her title to the Delaware street property. Over a motion for a new trial judgment was rendered upon the verdict.

The errors assigned are, overruling the demurrers to the answer and cross complaint, and overruling the motion for a new trial.

We think this case is substantially disposed of by the former decision of this court, reported in 93 Ind. 281, *supra*. In that case the court in effect says, that under the statute of 1852, the wife has a right to the rents accruing from her separate property. "If the evidence showed that the wife had asserted a direct claim to the rents, and that the husband had retained them notwithstanding this claim, we should have no difficulty in sustaining the finding of the trial court" (which was in favor of the claimant), "but no such claim was made, nor is there any evidence from which it can legitimately be inferred that any such claim was ever asserted."

While there was additional testimony given in this case to what was given in the former case, there is no material difference upon the question of the wife's ever claiming the rents as her separate property.

In the former case the court further says: "It is evident that where there is no tort no charge can be created against the husband in favor of the wife unless there is something

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in the nature of an agreement, express or implied, upon which to base the liability. No one can be charged as a trustee where there is no liability growing out of a contract or duty, or springing from a tort. The rule which applies in ordinary dealings between parties not sustaining marital relations upon the subject of implied contracts can not, it is obvious, apply in its full force where the relation of husband and wife exists. The relation of the parties has always been regarded as exerting an important influence upon the question. *Andrews v. Huckabee*, 30 Ala. 143; *Hill v. Chambers*, 30 Mich. 422. If the facts show that the husband received the rent from his wife's separate estate, intending to be charged, or received and used it over her objection, then, no doubt, he would be liable, no matter to what purposes of his own he may have applied them; if, on the other hand, the circumstances show that the wife did not intend to charge the husband, and that he did not intend to account, then the courts can not, after his death, charge his estate." See authorities therein cited.

In the opinion in the case *supra*, the case of *Hileman v. Hileman*, 85 Ind. 1, is criticised and doubted, whether it ought not be limited in some degree at least, "for it may well be questioned whether the mere fact of entering upon the duty of managing the wife's property constitutes the husband a trustee in all cases." For, where the husband uses the wife's money for the common benefit of the family, no charge accrues against him, "in the absence of evidence of an understanding or agreement on his part to repay her." See authorities cited in support thereof.

Appellee and deceased were married in 1842; at that time deceased had very little property; appellee owned the Washington street lot, with an old frame building situated thereon, and some Hendricks county real estate. In 1853 or 1854 they sold the Hendricks county land, and with the proceeds thereof, the rents of the Washington street property, and some borrowed money by deceased, the old frame building was re-

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moved, and a new brick business house was erected upon the Washington street lot at a cost of some \$4,000.

In 1858 the deceased purchased and improved the property on Delaware street as a residence, using the rents from the Washington street property, and perhaps some borrowed money, for that purpose, at a cost of \$5,000. The rents had all the time been managed and used by deceased in support of the family, improving the Washington street property, and providing for them a residence, without any objection from appellee, or claim made thereto by her during the lifetime of the deceased, nor until these suits were commenced. After the business had been thus managed for over thirty-seven years, it appears rather late for appellee to assert a claim to the rents, and thus wipe out from deceased's children and creditors all the earnings and accumulations of the husband during a lifetime business. We do not see manifested in the transaction of the business any intention in either of the parties to create a trust in the deceased to the extent of the use of the rents of the Washington street property. Such use of the rents, without any separate account thereof being kept by either of the parties, raises a strong presumption that she consented to said use. The Washington street property was held jointly by the husband and his wife. The rents were collected and used in the same manner, for the general benefit of the family. The husband did not use them as her separate property. There is nothing in the record in the case tending to show that at the time the husband collected the rents it was intended by either of the parties that the rents, or any part thereof, should be held by him as her separate property. The evidence all shows that at that time, by common acquiescence, the husband used the rents with his own means, and as his own means, for the benefit of the family generally, without any intimation that he or his estate should be held accountable therefor. Prior to the passage of the act of 1852 the rents of the wife's property belonged to the husband by virtue of his marital rights. But after the pas-

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sage of that act the wife had the right to control such rents as her separate property, but that right she could undoubtedly yield to the husband. We think the finding of the court against appellee on her claim against the estate was right.

If she had no claim against the estate for the funds thus used, upon what principle could she have a claim upon the property in which said funds, or a part thereof, had been invested? In quietly acquiescing for more than twenty years in the use of the rents made by the husband, we think she must be deemed to have waived all right to follow them into the property.

The only thing in the evidence derogatory to this view of the case is that Thomas C. Chill as a witness, testified that about a month before the death of deceased, in 1879, twenty-one years after the execution of the deed, he heard deceased, in a conversation on the street in Indianapolis, say that his wife did not know that the deed to the Delaware street property was made in his name for some time afterwards, and, when she learned it, she objected and was dissatisfied, and that he intended to change it after awhile. What her objections were, or how he intended to change the deed, was not explained. The wife undoubtedly had full knowledge of the purchase of the property, and the manner in which it was paid for and improved as a residence for the family. Nothing appears to have been said at the time of the purchase as to in whose name the property should be held; whether in either of their names individually, or both jointly, like the Washington street property, did not then appear to concern the wife. And without any agreement then expressed or implied, or tortious act by the husband, no trust could arise therefrom in behalf of the wife. *Bristor v. Bristor*, 93 Ind. 281, *supra*. We do not think that this additional testimony, to what was given upon the former trial, tends to establish any trust at the execution of the deed.

The whole evidence in the case shows that appellee asserted no claim to the rents as her separate property, and that

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she treated them as a gift to the husband, to be by him invested in any manner he might desire for the general welfare of the family; and, after being so invested, she could not legitimately claim him as her trustee to the extent of such investment.

We see no error in the rulings upon the pleadings, but think the evidence does not fairly tend to support the finding in favor of appellee upon her cross complaint, and that the court erred in overruling appellant's motion for a new trial. The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded with instructions to the court below to grant a new trial, and for further proceedings.

Filed Jan. 8, 1885; petition for a rehearing overruled March 20, 1885.

No. 11,996.

THE BOARD OF COMMISSIONERS OF CARROLL COUNTY v. GRESHAM.

OFFICE AND OFFICER.—*Gratuitous Service.*—Where official duties, to which no compensation is attached, are imposed upon a public officer, they must be performed gratuitously.

SHERIFF.—*Compensation for Keeping Jail and Caring for Prisoners.*—The act regulating the fees of sheriffs was intended by the Legislature to be a complete fee bill, prescribing, so far as could be, the services for which they should receive compensation, and the fees designated therein are to be deemed a full remuneration for all services incident to the office, and such officer is entitled to no extra compensation for keeping the county jail and caring for prisoners.

SAME.—*Cure of Insane Persons.*—*Presumption.*—There being no statute authorizing the circuit court to commit insane persons, as such, to the county jail, the presumption is that they were duly committed for some offence, and that they were received and held as other prisoners, and for their care the sheriff can claim no extra compensation.

From the Tippecanoe Circuit Court.

101	53
135	272
137	280

101	53
130	169

101	53
131	274

101	53
180	628

101	53
1169	301

The Board of Commissioners of Carroll County v. Gresham.

J. C. Nelson, J. C. Odell, R. P. Davidson and J. C. Davidson, for appellant.

J. Applegate, C. R. Pollard, J. R. Coffroth and T. A. Stuart, for appellee.

MITCHELL, J.—The appellee's claim, as finally amended and passed upon in the circuit court, was stated in his bill of particulars as follows:

"The Board of Commissioners of the County of Carroll, in the State of Indiana.

"To EDWARD H. GRESHAM, Dr.

"For services rendered personally by plaintiff in keeping the jail of the county of Carroll, in the State of Indiana, for 4 years from Nov. 8th, 1876, to Nov. 8th, 1880 \$4,380

"To cash paid Will H. Haughey, for like services, from Jan. 1st, 1877, to Nov. 1st, 1879, at \$75 per month 1,600

"To cash paid William Scott, for like services, from Sept. 1st, 1879, to November 8th, 1880, at \$75 per month 712

"To cash paid Frank Gresham, for like services, from November 8th, 1876, to November 10th, 1880, at \$75 per month 2,190."

It was specially found by the court that whatever was done by Gresham in "keeping the jail" was done while he was the sheriff of Carroll county, and it was also found that during the whole period of his service as sheriff he had claimed and was allowed by the commissioners compensation for all services for which the statute makes specific provision.

After enumerating various specific services which the court found the appellee and his assistants performed in and about the jail, such as carrying fuel into the jail, cleaning the closets, locking the prisoners in their cells at night and letting them out in the morning, and washing and cleansing some insane persons who were committed to the jail by order of the Car-

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roll Circuit Court, etc., the court further found as follows: "That the duties and services so enumerated, and including the care of said insane persons, and for which no *specific* pay is allowed, are and were of the value of \$1,000 per year, and for the whole four years are and were of the value of \$4,000."

Upon the facts found the court stated as a conclusion of law, that the appellee was entitled to recover \$4,000, and accordingly judgment was rendered against the board of commissioners for that sum. It is apparent from the special findings of the court, that for all services rendered by the appellee, for which there is a specific compensation fixed by law, he has been allowed and paid; but the argument is pressed that because the services enumerated were rendered, and were necessary, and because the law provides no specific compensation for such services, therefore the county is liable to pay for them as upon a *quantum meruit*.

That an individual is elected to the office of sheriff in a particular county, and because he thereby becomes *ex officio* the jailor of that county, and responsible for the care and custody of the prisoners confined in the jail which is provided and maintained by law in that county, does not imply that the municipality shall come under any other obligation to him except that provided by the very terms of the statute. The statute prescribes, specifically, the duties of the sheriff with respect to receiving and caring for prisoners confined in the county jail, and fixes the compensation which shall be paid him for receiving, discharging and boarding them, and when the county, through its board of commissioners, has provided a suitable jail, and maintains in it suitable furniture and appliances for its proper keeping and pays the jailor the compensation specifically provided by statute, it has discharged its municipal obligation and exhausted its corporate power over the subject.

There can be no such thing in legal contemplation as an implied *assumpsit* on the part of a county with respect to the services of county officers. In performing services for the

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county, the officer and the county stand related to each other precisely as an individual and the officer, the statute regulating fees being the measure of compensation for the one and the extent of the liability of the other in each case.

For services imposed by law upon the officer, which are not specially rendered for the municipality, as a prerequisite to the liability of the county for said services the officer must show: 1. A statute fixing the compensation for the service. 2. A law authorizing or making the county liable to pay for such service out of its treasury. It is of the highest concern to the public that this should be so; otherwise it would be within the power of one body of county officials to compensate the other county officers out of the public treasury, as a matter of grace and favor, without limit or restraint.

This principle has been recognized in this State from the beginning, and accordingly it has invariably been held that official duties imposed upon a public officer, to which no compensation is attached, must be performed as all official duties anciently were, gratuitously.

The act regulating the fees of sheriffs was plainly intended by the Legislature to be a complete fee bill, prescribing, so far as could be, with precision and certainty, the services for which they should receive compensation, and this makes it all the more apparent that the fees designated therein are to be deemed a full remuneration for all services incident to the office. *Rawley v. Board, etc.*, 2 Blackf. 355; *City of Brazil v. McBride*, 69 Ind. 244; *Board, etc., v. Leslie*, 63 Ind. 492; *Hartwell v. Supervisors, etc.*, 43 Wis. 311; *Freeholders of Morris Co. v. Freeman*, 44 N. J. L. 631; *Atchison Co. v. Tomlinson*, 9 Kans. 167.

In the argument of counsel, stress is laid on the provision, in the act above mentioned, that "In all cases where the sheriff shall perform any service for the county, required by law to be performed by him, and there is no provision for its payment, the board of county commissioners shall allow and

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pay such sheriff the same compensation as is allowed by law for similar services." R. S. 1882, sec. 5874.

The services enumerated in the special finding, and for which the appellee had judgment below, were in no sense services performed "for the county." The prisoners and other persons committed to his custody, to whom attention was given, were not committed to the jail by, nor for the county, nor was the county interested in them, in any respect different from a city or town, or other corporation within the county, except to discharge its statutory obligation of providing, furnishing and maintaining the jail, and paying the sheriff the compensation provided by law for receiving, discharging and boarding them while in his custody.

It is contended further that because the court, in its special finding, found that the appellee had the care of some insane persons who were committed to the jail by the order of the Carroll Circuit Court, this case is thereby distinguishable from that of *Bynum v. Board, etc.*, 100 Ind. 90.

Our attention has been called to no statute, nor are we aware of any, which authorized the Carroll Circuit Court to commit insane persons, as such, to the county jail. We are to presume, therefore, that the insane persons who were committed to the jail by the circuit court were so committed in pursuance of a conviction duly had for some misdemeanor of which they were found guilty, and that they were received and held under the law as other prisoners. Adhering to the ruling in the case of *Bynum v. Board, etc.*, *supra*, and the authorities therein cited, it results that on the facts found by the court the conclusion of law should have been that the appellee was not entitled to recover for any of the services mentioned in the complaint.

The judgment is reversed, with costs, with instructions to the court below to state its conclusions of law and render judgment for the appellant in accordance with this opinion.

Filed April 1, 1885.

Yelton *et al.* v. Addison *et al.*

No. 11,709.

YELTON ET AL. v. ADDISON ET AL.

HIGHWAY.—*User for Twenty Years.*—*Proceedings to Enter of Record.*—*Notice.*—Under the statute, R. S. 1881, section 5035, the board of county commissioners may cause a public highway which has been used for twenty years without being recorded, to be ascertained, described, and entered of record. No land not already in use by the public is to be taken. Yet the proceeding involves an inquiry and decision affecting the rights of the owners of property; and these must in some manner be notified of the pendency of the proceedings. No presumption of notice will be indulged.

SAME.—*Appeal to Circuit Court.*—*Dismissal for Want of Notice.*—Persons aggrieved by the decision of the board may appeal therefrom, under the general statute, and may move, in the circuit court, to dismiss the cause for the want of any notice of the proceeding before the board.

From the Henry Circuit Court.

C. C. Perdiew and *J. M. Morris*, for appellants.

L. P. Mitchell, *D. W. Chambers* and *J. S. Hedges*, for appellees.

BLACK, C.—Upon a petition signed by the appellees, the board of commissioners of Henry county ordered that a certain road, described in the petition and alleged therein to have been used as a public highway for more than twenty years, be a road of record thirty feet in width and be kept in repair as other highways already established.

From this decision Hayden Yelton and Alexander Reynolds, who are the appellants here, took an appeal to the Henry Circuit court, by the filing of an affidavit and an appeal bond with the county auditor. In the circuit court, the parties having appeared by their attorneys, the appellants moved to dismiss the cause, and the motion was overruled. Among the grounds stated in this motion was the following: "Because there was no notice given of the filing of the petition in said cause, nor of the petitioners' intention to present their petition in said cause to said board of commissioners,

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nor did these defendants have any notice thereof before the hearing and determination thereof."

The transcript and papers filed in the circuit court showed the proceeding before the board of commissioners to have been *ex parte*, and did not show the giving of notice thereof in any manner.

The proceeding was based upon the provision of section 5035, R. S. 1881, that the board of county commissioners shall have the power to cause such of the roads used as highways as have been used for twenty years, but not recorded, to be ascertained, described and entered of record. The statute makes no provision for notice. In *Weston v. Lumley*, 33 Ind. 486, 493, a proceeding under this statute was spoken of as being *ex parte* and to some extent in the nature of a proceeding *in rem*. In *State v. Schultz*, 57 Ind. 19, in speaking of such a proceeding and of said statute, it was said: "We are of opinion, upon an examination of the statute, that no notice or process was necessary in the proceeding before the board. On an application for the location, vacation or change of a highway, notice must be given by publication in a newspaper, or by posting up notices; but we find no law requiring or providing for notice, in cases like that in which the perjury is alleged to have been committed. The law does not provide for notice in such cases, nor the manner of giving the same; and it seems to us that it was contemplated by the Legislature, that the board might exercise the power conferred by the statute set out above, without the publication of such notice as is required on applications to locate, vacate or change highways." In *Vanderer v. Garshwiler*, 63 Ind. 185, this passage from *State v. Schultz*, *supra*, was quoted, and afterwards the following language was used by PERKINS, J.: "It may not be improper, before closing this opinion, to state, in the light of previous decisions, some of the steps necessary to be taken to obtain a description and record of a highway, under section 45, *supra*," (being said section 5035, R. S. 1881). "In the first place, if the proceeding is inaugurated

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by a petition, the sufficiency and certainty of it may be tested by a demurrer and motion, as are complaints in other cases. It should state the names of the owners of the property over which the road is claimed to run, so that the court can cause proper notice to be given to them of the pendency of the petition. Such notice is necessary, because, though the statute provides for none, the fundamental principles of law and justice require that those whose rights are to be directly affected by legal proceedings and judgments shall have notice and an opportunity to be heard in opposition to such proceedings. * * * User, with the consent of the owners, must be shown. In the case at bar the parties appeared without notice, which cured the defect of want of notice." In *Higham v. Warner*, 69 Ind. 549, such a proceeding had been commenced by petition, and notice was given of the application, and remonstrators opposed the proceedings before the board of commissioners. It was said that it was not necessary to file any petition in such a case, and that the jurisdiction of the board of commissioners, and the right to appeal to the circuit court, and the jurisdiction of the circuit court on appeal, had been frequently recognized in such cases by this court; that "It is not error to commence such proceedings by petition, and doubtless proper, when moved by any person other than the board of commissioners; but the board may proceed upon their own motion, if they think it proper to do so. But a written petition is not necessary in either case."

The statute contemplates the existence of a road which has been used as a public highway for twenty years, but has not been recorded. The purpose of the proceeding authorized by the statute is to cause such a public highway "to be ascertained, described, and entered of record." No land not already in use by the public is to be taken; yet the proceeding involves an inquiry and decision affecting the rights of the owners of property. To authorize the board of commissioners to adjudicate upon such rights, the persons whose

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interests are to be affected must be notified, in some manner, of the pendency of the proceeding before the board.

It can not be said that the statute contemplates any seizure of the *rem*, which could operate as constructive notice to those having interests therein affected by the proceeding. There is nothing in the nature of what is expressly provided for by the statute, from the doing of which a presumption of notice thereof to interested persons can reasonably be indulged. Whether notice by publication in a newspaper or by posting, not being directed by the statute, would give the board of commissioners jurisdiction, or whether actual notice to all whose interests would be directly affected would be necessary or proper, we will not now decide, in the absence of argument upon the matter. In the case at bar, there was no notice of any kind, and no appearance of those whose interests would be affected, and we think that persons who, by reason of their having interests and being aggrieved by the decision, appealed therefrom under the general statute authorizing such appeals, might move in the circuit court to dismiss the cause because of the want of any notice of the proceeding before the board of commissioners.

PER CURIAM.—It is ordered upon the foregoing opinion, that the judgment be reversed at the costs of the appellees, and the cause is remanded with instructions to sustain the motion to dismiss the cause.

Filed March 20, 1885.

No. 11,867.

HILDEBRAND ET AL. v. MCCRUM.

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FALSE IMPRISONMENT.—*Pleading.*—A complaint, alleging that the defendants locked the plaintiff up in a room, and by threats of violence, with weapons in hand, compelled him to confess that he had made and violated a certain promise of marriage, and extorted from him an agreement to pay a sum of money for the breach thereof, sufficiently charges false imprisonment.

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SAME.—*Res Adjudicata.*—*Breach of Promise.*—In such case, an answer, alleging that an action had been brought by one of the defendants against the plaintiff for a breach of promise of marriage, wherein the matters and things complained of in the present suit had been fully adjudicated and determined, is insufficient, since the matter of the false imprisonment could not have been adjudicated in such former action.

SAME.—*Demurrer.*—*Defect of Form.*—*Harmless Error.*—To such answer, a demurrer, alleging that the same did not "state facts sufficient to constitute a bar to the plaintiff's complaint," can not be sustained over the objection of the defendant. Yet, when it appears that the error in sustaining such a demurrer is harmless, such error will not justify a reversal of the final judgment.

From the Huntington Circuit Court.

J. L. Farrar and L. P. Milligan, for appellants.

J. C. Branyan, M. L. Spencer, R. A. Kaufman, W. A. Branyan, B. M. Cobb and C. W. Watkins, for appellee.

BEST, C.—This action was brought by the appellee against the appellants for false imprisonment.

The second paragraph of the complaint, upon which the cause was tried, averred, in substance, that the appellants, John H., George W., William W., Henry, Nancy and Elizabeth Hildebrand and Marshall M. Tidsworth, unlawfully conspired together for the purpose of wrongfully compelling the appellee to admit a promise of marriage with Elizabeth Hildebrand, and thus to extort from him one thousand dollars as damages for breach of such promise; that in pursuance of such conspiracy two of the appellants, brothers of said Elizabeth, called upon the appellee at his house at 10 o'clock P. M. of the 13th day of January, 1883, and informed him that their sister desired to see him at once at their house; that, not suspecting their purpose, he accompanied them to their house, and as soon as he entered the house they locked the doors upon him, called from an adjoining apartment their confederates, and at once charged him with having made and violated such promise, and threatened him with great personal violence, unless he admitted such promise, and would then agree to pay as damages for the breach of such promise

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the sum of one thousand dollars; that while one of said appellants had a club drawn over him, and another a pistol drawn upon him, and while he was so imprisoned as aforesaid, he was compelled to and did admit the making of such promise, and then agreed to fulfil the same on the succeeding Monday; that his admission and promise were enforced from him by such threats while he was so imprisoned, all of which was without his consent and to his damage, etc.

This paragraph was clearly sufficient as charging false imprisonment.

The fourth paragraph of the answer alleged, in substance, that Elizabeth Hildebrand instituted an action in the Huntington Circuit Court against the appellee for breach of such marriage contract, and in such case the matters and things in the complaint mentioned were therein fully adjudicated and determined.

This paragraph was insufficient, for the reason that the matters and things in the complaint mentioned could not have been adjudicated in such action. They did not constitute a defence, nor could they have been made available by any mode of pleading. If the plaintiff in such proceeding, in support of her cause of action, relied upon the admission thus alleged to have been obtained, the circumstances under which it was made were admissible in evidence for the purpose of destroying its force. This was the only purpose for which the appellee could employ them, and as he could not recover damages in such action for the alleged wrong, nor recoup them from any damages to which the plaintiff may have been entitled for breach of the alleged agreement, the mere admission of them in evidence did not amount to an adjudication of the alleged wrong.

In addition to this the pleader embraced in this paragraph of answer all the pleadings in such action, and as no defence was interposed other than the general denial, it thus appears that no such matters were in fact involved in the issues. The paragraph was, therefore, insufficient.

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The demurrer to this paragraph alleged that the same did not "state facts sufficient to constitute a bar to the plaintiff's complaint," and the appellants insist that it was defective in form, and that, therefore, the court erred in sustaining it. The form of this demurrer can not be sustained for the reasons given in the case of *Thomas v. Goodwine*, 88 Ind. 458.

In many cases decided by this court it has been held that where demurrers, defective in form, have been overruled, such objection to the demurrer justified the action of the court in overruling it, and that this court would not disturb the ruling. *Jarvis v. Strong*, 8 Ind. 284; *Depuy v. Clark*, 12 Ind. 427; *Tenbrook v. Brown*, 17 Ind. 410; *Porter v. Wilson*, 35 Ind. 348; *Reed v. Higgins*, 86 Ind. 143; *Thomas v. Goodwine*, *supra*.

Soon after the adoption of the code a few cases were reversed for an error in sustaining a demurrer, defective in form, to a pleading. *Lane v. State*, 7 Ind. 426; *Hutton v. Indiana Central R. W. Co.*, 7 Ind. 522; *Dugdale v. Culbertson*, 7 Ind. 664.

In neither of these cases, however, was it decided that such error, if harmless, would nevertheless work a reversal of the judgment. Such question was not considered, and so far as we are advised has never been passed upon by this court. Since then the doctrine that a harmless error will not work a reversal of the judgment has been firmly established, and has been applied by this court to every other erroneous ruling which affirmatively appears to have been harmless. An error in sustaining a demurrer, proper in form, to a sufficient pleading, has repeatedly been held not to warrant a reversal of the judgment, where the party was not injured by such ruling. *Porter v. Silvers*, 35 Ind. 295; *Wilson v. Root*, 43 Ind. 486; *Emmons v. Meeker*, 55 Ind. 321; *Fuller v. Wright*, 59 Ind. 333.

The principle that supports the rule thus announced ignores the method by which the error was committed, and applies itself to the quality of the act done. If this carries no injury the error is harmless, however committed. Applying this rule to an error committed in sustaining a defective de-

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murrer to an insufficient pleading, the conclusion can not be avoided that such ruling was harmless, and, therefore can not work a reversal of the judgment.

This disposes of all the questions discussed, and as there is no error in the record the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed March 20, 1885.

No. 11,899.

TRAYLOR v. THE STATE.

CRIMINAL LAW.—Abortion.—Indictment.—Duplicity.—Where an indictment is not entirely formal in all its parts, but may be construed as merely averring specifically that the death of the woman was caused by the efforts of the defendant to procure an abortion, such indictment is not bad for duplicity in charging abortion and also involuntary manslaughter in the same count.

SAME.—Evidence.—Order of Proofs.—Corpus Delicti.—To sustain a criminal charge, proof of two distinct propositions must be made, first, that the act constituting the essence of the offence was done, and, second, that it was done by the person charged. In regular order, evidence tending to implicate the party on trial ought not to be introduced until the principal fact, the *corpus delicti*, has been established, and to sustain a conviction it ought to be proved beyond a reasonable doubt.

SAME.—In a prosecution for procuring an abortion resulting in the death of the pregnant woman, it is the procurement of the miscarriage that constitutes the *corpus delicti*.

From the Pike Circuit Court.

F. B. Posey, J. W. Wilson, W. R. Gardner and S. H. Taylor, for appellant.

F. T. Hord, Attorney General, E. A. Ely and W. F. Townsend, for the State.

NIBLACK, J.—This was a prosecution for procuring an abortion, which resulted in the death of the pregnant woman. R. S. 1881, section 1923. The indictment was in two counts.

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The first charged that "Thomas Traylor, on the 30th day of September, 1883, at and in the county of Pike, and State of Indiana, did then and there, unlawfully, feloniously and wilfully, employ and use a certain instrument, to the grand jurors unknown, in and upon one Anna Poe, who was then and there a woman pregnant with child, and did then and there, unlawfully, feloniously and wilfully, introduce said instrument into the womb of the said Anna Poe, with intent then and there, and thereby, to procure and produce the miscarriage of the said Anna Poe, the said Thomas Traylor then and there well knowing that said use of said instrument would produce such miscarriage, and it not being necessary then and there to produce such miscarriage for the preservation of the life of the said Anna Poe, by reason whereof the said Anna Poe languished until the 1st day of October, 1883, and then and there died. And so the grand jurors aforesaid, on their oath aforesaid, do charge and present that the said Thomas Traylor, in manner and form and by the means aforesaid, did then and there, unlawfully and feloniously, kill and murder her, the said Anna Poe.

The second count was in its averments substantially similar to the first, except that it charged Traylor with having administered to Anna Poe a certain noxious substance, to the grand jurors unknown, for the purpose of procuring and producing her miscarriage.

Verdict, finding the defendant guilty as charged, assessing a fine of \$250 against him and directing that he be imprisoned in the State's prison for the period of seven years. Motions for a new trial and in arrest of judgment were severally overruled, and judgment on the verdict.

The first question made here is upon the sufficiency of the indictment upon the motion in arrest of judgment. In opposition to its sufficiency, it is argued that both counts contained, first, a distinct charge of using unlawful means to procure a miscarriage, and, second, an allegation of facts

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constituting the crime of involuntary manslaughter, and hence that both were bad for duplicity.

The indictment was not entirely formal in all its parts, and in its structure was somewhat anomalous, but we do not regard either count as having been bad for duplicity. As we construe the concluding paragraphs of both counts, they amounted only to mere specific averments that the death of Anna Poe resulted from the respective efforts of Traylor to procure her miscarriage, and consequently not to charges of involuntary manslaughter, within the purview of section 1908, R. S. 1881. *Montgomery v. State*, 80 Ind. 338 (41 Am. R. 815); *Wood v. State*, 92 Ind. 269; *State v. Barker*, 28 Ohio St. 583.

The next question made for our decision is upon the alleged insufficiency of the evidence to sustain the verdict. It was shown by the evidence that Anna Poe at the time of her death was an unmarried woman about twenty-three years old; that Traylor was an unmarried man and had been much in the company of, and apparently a suitor to, Anna Poe for the preceding two or three years; that in the afternoon of Sunday, the 30th day of September, 1883, they rode out together in a buggy for probably two hours, returning about dark; that Traylor remained all night at Anna's father's house; that some time after midnight Anna was taken violently ill and was, not long afterwards, delivered of a foetus indicating about seven months' advance in pregnancy; that excessive flooding ensued, from which she sank rapidly and died between eight and nine o'clock next morning; that a physician, who delivered her of the after-birth, reached her about a half an hour before she died; that the physician made no special examination of the person of his patient, but saw nothing to indicate that improper means had been used to produce a miscarriage; that an inquest was held upon the body, but no *post mortem* examination was made.

Traylor, as a witness in his own behalf, admitted that illicit relations between him and the deceased had existed for a year

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or more before her death, and the circumstances generally pointed to him as the guilty party, conceding that the miscarriage was the result of some criminal misconduct. But as the evidence comes to us there was nothing either showing, or tending to show, that the miscarriage was caused by any artificial or unlawful means; on the contrary, the deceased told her physician, as a dying declaration, that nothing had been done to bring about her miscarriage, but that it had come on naturally. All others upon whom suspicion was sought to be cast denied all knowledge of anything having been either done or suggested calculated to produce the miscarriage of the deceased.

To sustain a criminal charge proof of two distinct propositions must be made: *First*. That the act constituting the essence of the offence was done. *Secondly*. That it was done by the person charged. In regular order, evidence tending to implicate the party on trial ought not to be introduced until the principal fact, known in legal parlance as the *corpus delicti*, has been established. 3 Greenl. Ev., sections 19, 30. The *corpus delicti* forms a distinct ingredient in a criminal prosecution, and must be established beyond a reasonable doubt. It has been held that even the confession of the prisoner can not safely be accepted as conclusive, until the *corpus delicti* has been ascertained.

Wharton on Criminal Evidence says: "The death in homicide should be distinctly proved, either by inspection of the body, or by other evidence strong enough to leave no ground for reasonable doubt. The test is applicable to all crimes." Whart. Crim. Ev., sections 324, 325.

The alleged unlawful procurement of the miscarriage of the deceased constituted the *corpus delicti* in this case, and hence formed an essential ingredient in the prosecution, which ought to have been proved beyond a reasonable doubt. 1 Greenl. Ev., section 217.

In the absence, therefore, of any evidence fairly tending to establish the *corpus delicti* in this prosecution, we are con-

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strained to hold that the verdict was not sustained by sufficient evidence.

The judgment is reversed, and the cause remanded for a new trial.

The clerk will make the usual order for the return of the prisoner to the custody of the sheriff of Pike county.

Filed March 14, 1885.

No. 12,072.

THE STATE, EX REL. HORD, ATTORNEY GENERAL, v. THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY.

CONSTITUTIONAL LAW.—*Board of County Commissioners.—Inferior Courts.—Jurisdiction.—Appeals.*—Under section 1, of article 7, of our State Constitution of 1851 (section 161, R. S. 1881), it was competent for the General Assembly to provide by law that the board of commissioners of each county should constitute a court of inferior jurisdiction, and to clothe such court, as has been done, with original jurisdiction and judicial power over claims and accounts against the corporate county, and other matters of local interest, providing for appeals from its decisions to courts of superior jurisdiction.

PRACTICE.—*Claim against County.—Jurisdiction of County Board.—Appeal.—Res Adjudicata.*—Under sections 5758, 5759 and 5760, R. S. 1881, in force since May 31st, 1879, the board of commissioners of the county has exclusive original jurisdiction of any claim against such county, and the decision of such board either for or against such claim, if not appealed from as provided by law, is final and conclusive, and the adjudication may be pleaded in bar of another suit on such claim.

From the Washington Circuit Court.

F. T. Hord, Attorney General, for appellant.

S. B. Voyles and L. C. Embree, for appellee.

Howk, J.—On the 5th day of June, 1884, the State of Indiana, by the Hon. Francis T. Hord, its attorney general, presented to and filed with the appellee, for allowance, three separate demands, each containing "a detailed statement of the items and dates of charge," against such appellee. Of these demands, the first was for the aggregate sum of \$1,-282.96, the second was for the aggregate sum of \$1,617.53,

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101	69
147	456
101	69
159	503
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and the third was for the aggregate sum of \$146. The county board refused to allow the demands or any part thereof, and adjudged that the appellant take nothing thereby, and that the relator "pay all costs herein." From this judgment of the county board, the State, by its attorney general, appealed to the circuit court of Washington county. There the appellee by its counsel appeared and answered, in four paragraphs, the appellant's cause of action. Of these paragraphs of answer, the first was a general denial and was subsequently withdrawn; to the second paragraph, the appellant's demurrer was sustained by the court, and to the third and fourth paragraphs of answer, the appellant's demurrers for the alleged insufficiency of the facts therein were overruled by the court. The appellant refused to reply to the third and fourth paragraphs of answer; and thereupon it was adjudged that the appellant take nothing by its suit, and that appellee recover of the relator its costs herein.

The overruling of its demurrers to the third and fourth paragraphs of appellee's answer are the only errors assigned here by the appellant.

In the third paragraph of its answer, the appellee alleged that Daniel P. Baldwin, Esq., was the immediate predecessor of the relator, as attorney general of the State of Indiana, and, on June 6th, 1882, the appellant upon the relation of said Baldwin, as its attorney general, presented and filed the same claims and demands, now in suit, before the board of commissioners of Washington county; that upon such demands and items an issue was made on the day last named before such board, in regular session; that, by the consideration of such board, such items and demands were then tried and refused, and judgment was then rendered by such board, that the appellant take nothing by its suit, and that the relator, Baldwin, should pay the costs therein; that from such judgment no appeal was ever successfully taken, and such judgment was still in force; and that in the determination of the matters involved in such former suit, the matters

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and demands now in suit were fully and finally adjudicated and settled. Wherefore, etc.

In the fourth paragraph of its answer, the appellee alleged that, on December 4th, 1883, appellant, upon the relation of Francis T. Hord, Esq., its attorney general, presented and filed the same claims, items and demands, now in suit, before the board of commissioners of Washington county, for allowance and payment; that on such claims, items and demands, an issue was formed on the day last named before such board in regular session; that, after trial and hearing, such board rendered judgment of record, which stood unappealed from and unreversed, that the appellant take nothing by its suit, and that the relator pay the costs therein; and that upon such hearing of said cause, on the day last named, the same claims, items and demands, now in suit, were fully and finally considered, adjudicated and set at rest. Wherefore, etc.

The only objections which can be urged, with any degree of plausibility, to these paragraphs of answer, are, that under the laws of this State a board of county commissioners is not a court, or that, if a court, it can not sit in judgment upon a claim against the county, because, in its corporate capacity, the board is the county. Both these objections are strenuously urged upon our consideration, in the case in hand, and have been ably and elaborately discussed by the learned attorney general, in his exhaustive brief of this cause. It seems to us too late to claim that the board of commissioners of a county is not, in this State, a court. In section 1, of article 7, of the Constitution of 1851 (section 161, R. S. 1881), it is declared that "The judicial power of the State shall be vested in a Supreme Court, in circuit courts, and in such inferior courts as the General Assembly may establish." On March 14th, 1881, this section was amended by omitting the word "*inferior*," where it occurs, and by substituting, in its place, the word "*other*." In the first session of the General Assembly, after the adoption of the Constitution of 1851, largely composed of members of the convention which

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framed the Constitution, provision was made by law for the organization in each county of a board of commissioners of the county, and by that and other laws, then and since passed, such boards have been clothed with original jurisdiction and judicial power over a large class of cases, materially affecting the local interests of the people, so that they have become the most important courts of inferior jurisdiction in the State. Especially was the board of commissioners clothed with jurisdiction to hear and decide upon all claims and accounts chargeable against its county; and from the decisions of such board upon any such claims, provision was made by law for appeals to the circuit court of the proper county. Sections 5771 and 5772, R. S. 1881. It is true that under section 5771, if a claim was disallowed, in whole or in part, the claimant might appeal, or, at his option, bring an action against the county. *Jameson v. Board, etc.*, 64 Ind. 524, and cases cited.

This provision of section 5771, however, was repealed by necessary implication, by "An act regulating the presentation of claims against counties in the State of Indiana, before the board of county commissioners, and the adjudication of the same," approved March 29th, 1879. This act took effect on the 31st day of May, 1879, and is still the law of this State. Sections 5758, 5759, 5760 and 5769, R. S. 1881. Section 5758 provides, in effect, that every claim against a county must be presented to its board of commissioners. Section 5759 requires the county commissioners to examine into the merits of all claims so presented, and, in their discretion, to allow any claim in whole or in part, if they find it to be just and owing. Section 5769 provides that any person or corporation, feeling aggrieved by any decision of the board of county commissioners upon any such claim, may appeal to the circuit court of such county, as provided in section 5773, in force since May 6th, 1853. And section 5760 provides that no court shall have original jurisdiction of any claim against any county in this State, in any manner, except as provided for in the above entitled act of March 29th, 1879.

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In *Pfaff v. State, ex rel.*, 94 Ind. 529, it was held by this court, and correctly so, we think, that under the provisions of the aforesaid sections 5758, 5759, 5760 and 5769, R. S. 1881, the board of commissioners of each county has exclusive original jurisdiction of every legal claim against such county, that every such claim must be presented to such board for allowance, and that no other court can acquire jurisdiction of the claim except by appeal from the judgment of the county board. From the earliest organization of the board of county commissioners, this court has always considered such board a court of inferior or limited jurisdiction, and has uniformly held that the decisions and judgments of such board, in causes or proceedings whereof it had jurisdiction, however erroneous they might be, were not void, and were not the subjects of collateral attack. In *Snelson v. State, ex rel.*, 16 Ind. 29, it was argued by the appellee that certain judgments of the county board, allowing claims against the county, were void for want of jurisdiction, because the claims so allowed were not chargeable against the county. In answering this argument the court said: "But whose province and duty was it to judge whether the accounts were chargeable against the county? Clearly that of the board. If they decided that question wrongly, they committed an error of judgment, but did not usurp an unconferrred jurisdiction. If the account was properly chargeable against the county, it is clear that the action of the board would be conclusive, unless appealed from. Now the argument * * * proves too much. It proves that when the board decides correctly upon the liability of the county, the decision is conclusive; but when it errs in that respect, its decision is a nullity, and not merely erroneous: that the board has jurisdiction to decide right, but no jurisdiction to decide wrong."

In *Board, etc., v. Gregory*, 42 Ind. 32, the court said: "We have, after much reflection and upon mature consideration, reached the conclusion that the board of commissioners, in acting upon claims against the county, act in a judicial ca-

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capacity, and that their decisions are conclusive and binding, alike upon the county and the claimant, unless appealed from, or an independent action is brought against the county where the claim is disallowed." Of course, as we have seen, under the statute now in force, an "independent action" is no longer allowable, but the only remedy of the claimant, where his claim is disallowed, is now an appeal to the circuit court of the county. Section 5769, R. S. 1881. If no such appeal is taken, the decision of the county board disallowing his claim is now conclusive and binding against the claimant. But we need not extend this opinion in the citation of authorities for the purpose of showing that in this State, under its Constitution and laws, the board of commissioners of a county is a court of inferior or limited jurisdiction. See *Ind. R., passim*.

We are of opinion, also, that the former adjudications of the claims now in suit, pleaded by the appellee in bar of the present suit, were not void by reason of the fact that the same men who constituted the court also constituted, in their corporate capacity, the corporation county. If the appellant felt itself aggrieved by either of the adjudications, it had as full and complete a remedy as any other suitor, by an appeal to the circuit court of the county and by change of venue from the county. Not having taken an appeal from either of the former adjudications of its claim within the time limited by law, the State of Indiana, like any other claimant, must be held, we think, to be concluded and bound by such former judgments. When the State becomes a suitor in any of the courts, it is as much bound by the laws of the land, by the rules of pleading and practice, and by the decisions and judgments of the courts, inferior or superior, as any other suitor.

We conclude, therefore, that the court committed no error in overruling the demurrers to the third and fourth paragraphs of answer.

The judgment is affirmed, with costs.

Filed March 19, 1885.

Krug et al. v. Davis.

No. 12,129.

KRUG ET AL. v. DAVIS.

PRACTICE.—*Burden of Proof.*—*Special Finding.*—A party who has the burden of proof can not recover unless all the facts essential to a recovery appear in the special finding.

LANDLORD AND TENANT.—*Crops.*—*Trespasser.*—*Notice.*—*Purchaser Pendente Lite.*—The relation of landlord and tenant can not be created by an entry upon land without right, and the person who so enters can not take away crops sown by him, and one who enters during pending litigation, is chargeable with notice and is bound by the judgment rendered.

SAME.—*Dismissal of Action.*—*Judgment.*—One who assumes to acquire an interest in land while an appeal is pending, is bound by the judgment rendered on appeal, and the dismissal of the action upon its return to the trial court does not relieve him.

PRACTICE.—*Judgment Correcting Error in Special Finding.*—*Harmless Error.*—Where an error in a special finding is corrected by the final judgment, the error is rendered harmless.

From the Montgomery Circuit Court.

G. W. Paul and J. E. Humphries, for appellants.

P. S. Kennedy, S. C. Kennedy and E. C. Snyder, for appellee.

ELLIOTT, J.—The principal question in this case is set at rest by the cases of *Paul v. Davis*, 100 Ind. 422, *Humphries v. Davis*, 100 Ind. 274, *Humphries v. Davis*, 100 Ind. 369, *Davis v. Krug*, 95 Ind. 1, and *Krug v. Davis*, 87 Ind. 590.

The special finding shows that the appellant John Krug entered into possession of the land in controversy under the title of his wife, Elizabeth Krug, and that the title asserted by her was acquired as the alleged heir of her natural daughter, Emily Davis, who became the adopted daughter of Isaac Davis and his wife, Jessie Davis. It is also stated in the finding that a judgment in partition was rendered in the suit of Elizabeth Krug against Isaac Davis, setting off to her the land in dispute, and that "said partition suit was appealed to the Supreme Court, and was in all things reversed before the said wheat crop was harvested." It is further stated that a re-

101	75
126	104
197	490
101	75
137	253
101	75
141	177
101	75
144	607
101	75
152	138

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ceiver was appointed, and that the wheat sown by John Krug is now in the receiver's possession. The court stated as conclusions of law, that Elizabeth Krug did not inherit the land from her daughter, Emily Davis, and had no title to it; that the defendants were in the wrongful possession of the land, and that the appellee was entitled to the wheat in the hands of the receiver.

It is a familiar rule, that a party having the burden of the issue can not recover, unless all the facts essential to a recovery appear in the special finding. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Dodge v. Pope*, 93 Ind. 480; *Dixon v. Duke*, 85 Ind. 434; *Ayers v. Adams*, 82 Ind. 109; *Ex Parte Walls*, 73 Ind. 95; *Stropes v. Board, etc.*, 72 Ind. 42. This rule applies to the possessory right here asserted by John Krug.

The appellee's case was made out, when it appeared that he was the owner of the land, and that the appellant John Krug had entered into possession under Elizabeth Krug, who had no right or title to the land. If the person under whom he entered had no title or right to the land, she could convey none, and it devolved upon John Krug, when this fact appeared, to show some claim which warranted him in sowing the wheat which he now claims. There is nothing indicating that he possessed any such right. We must infer from the finding that he had full knowledge of all the facts, and if he did have this knowledge, he was chargeable with notice of the legal consequences resulting from them. *Dodge v. Pope, supra*. If he knew that his wife had no title, and no right to lease the land to him, then he was a mere naked trespasser. It is quite clear that no mere wrong-doer, who has neither right nor title, can successfully assert a right to crops. A trespasser can not, by his own wrongful act, create the relation of landlord and tenant, and it is this relation which confers the right to away-going crops. *Wood Landlord and Tenant*, p. 970.

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If it had appeared that John Krug had entered into possession without knowledge of the facts, after the rendition of the decree in the partition suit and before appeal, a serious question would have been presented. But the inference is against him upon these points, for the presumption is in favor of the ruling of the trial court. It must be inferred that he acquired possession while the litigation was still pending, and if he did, he is bound by the ultimate judgment rendered. If the appeal was pending, he entered into possession at his peril, and is bound by the final judgment rendered in the cause. A party who acquires rights *pendente lite* is bound by the judgment which terminates the litigation.

The fact that when the partition case went back into the trial court upon the judgment of reversal, the appellants, therein the plaintiffs, dismissed it, does not help Mr. Krug. There was not the semblance of title or right in his wife after the dismissal, and as she had none, neither had her husband, whose only claim was through her.

The court below dealt very liberally with John Krug, for it required the appellee to pay all the costs and expenses of the receivership, and decreed that the value of the wheat should be credited on the amount of the damages awarded the appellee. This certainly was all Krug could justly ask, and, in strictness, was more than he was entitled to receive. The effect of this decree was to allot to Krug the value of his crops, and to award to the appellee the rental value of his land. If an error had been committed in any of the conclusions of law, the final judgment, so favorable to the appellants, would have rendered it harmless.

Judgment affirmed.

Filed Feb. 13, 1885; petition for a rehearing overruled April 3, 1885.

Munson et al. v. Blake.

No. 11,358.

MUNSON ET AL. v. BLAKE.

DRAINAGE.—*Withdrawal of Part of Remonstrants.*—Where, in a drainage proceeding, a number of persons join in a remonstrance, any of them may afterwards withdraw therefrom, and thereby escape liability for costs thereafter created in consequence of the remonstrance; but such action will not defeat the remonstrance, nor impair or defeat, in any manner, the right of the other remonstrants to proceed as if such withdrawal had not occurred.

SAME.—*Verification of Remonstrance.*—The statute does not require that the remonstrance shall be personally verified by the remonstrants, but it may be verified by them, or by some person having authority to act for them, and if verified by one or more, but not by all of the remonstrants, either personally or by agent, such verification will be treated and regarded as made by all, and if, after the remonstrance is filed, those who verified it withdraw therefrom, such act will not operate as a withdrawal of the verification, but this will remain unaffected thereby.

SAME.—*Time Fixed for Report of Commissioners.*—*Statute Construed.*—The provision of the statute, R. S. 1881, section 4275, requiring the court to designate a certain time for the drainage commissioners to report, is mandatory and should be strictly enforced, but the court may, for good cause shown, extend the time first fixed to another definite day.

SAME.—*Objection must be Made Below.*—An objection that the report was not filed at the time fixed comes too late when made for the first time in the Supreme Court.

SAME.—*Effect of Delay of Commissioners' Report on Right of Remonstrants.*—Where the commissioners' report is not filed at the time fixed, and a remonstrance is offered within the statutory period after the actual filing of the report, the court should permit such remonstrance to be filed.

SAME.—Where it is shown by affidavit that the wrongful action of the commissioners prevented the filing of a remonstrance at an earlier period, the court should permit its filing at the time presented.

SAME.—*Appeal.*—*Presumption as to Name of Parties.*—Where, in proceedings for the establishment of a ditch, parties signed a remonstrance as "Hosmer & Hildreth," and were afterwards assessed, and an appeal was taken by Stephen R. Hosmer and Charles C. Hildreth.

Held, that it should be assumed that the appellants were, or represented, the same parties as those assessed, and therefore had a right to appeal.

SAME.—*Waiver.*—*Supreme Court.*—Where a motion is made to dismiss an appeal because co-remonstrants were not joined therein, an agreement by the parties to submit the cause, without insisting that the others should be made co-parties, waives the objection.

From the Marshall Circuit Court.

101	78
137	395
137	430
101	78
184	280

101	78
170	470

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J. D. McLaren, H. Corbin and F. W. Munson, for appellants.
A. C. Capron and P. O. Jones, for appellee.

COLERICK, C.—The appellee presented to the Marshall Circuit Court, at its October term, 1881, his petition for the location and construction of a drain, and on proof being made to the satisfaction of the court that proper notice of the appellee's intention to so present the same had been duly given as required by the statute, said petition was, by the court, at said term, referred to the commissioners of drainage of Marshall county, and they were directed by the court to view the proposed route of the drain, and if they found, upon such view, that the drain would be of public utility, etc., to establish the same, and assess the benefits and damages to each tract of land that would be affected by its construction, and make a report of their proceedings and action therein to the court on the first day of its next term, being the December term, 1881, thereof. On the twenty-seventh day of said December term, 1881, the commissioners made their report, in favor of the construction of the drain and assessing benefits and damages as aforesaid. Two days afterwards Matilda Parry and others, whose lands were assessed for the construction of the drain, filed their joint remonstrance against the confirmation of the report. The remonstrance was verified by the affidavit of the attorney of said Matilda Parry. No further steps were taken in the proceeding until the October term, 1882, when a motion was made by the appellee to strike out the remonstrance, on the ground that it was not "as to each and all" of the remonstrants "verified by affidavit as provided by law," which motion was overruled by the court, and afterwards, at the same term, Matilda Parry withdrew, as a remonstrant, her objections to the report of the commissioners, and afterward, at the same term, the commissioners filed an amended report, by which it appears certain assessments previously made by them, as shown in their original report, were, by them, reduced in amounts. No ob-

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jection was made to the filing of this report, but afterwards a motion was made to reject it, but the motion so made is not in the record, and hence we are unable to ascertain the grounds upon which it was based, and as it was subsequently withdrawn, the action of the court in permitting the report to be made is not properly before us for review. At the December term, 1882, a change on the bench having in the interim occurred, the motion to strike out the remonstrance, which had been previously overruled by the former judge of the court, was, without being renewed, summarily and irregularly sustained by the court, and thereupon an order was made approving and confirming the reports of the commissioners and directing the construction of the drain as located. Afterwards, but at the same term, Stephen R. Hosmer and Charles C. Hildreth, two of the persons who had joined with Matilda Parry in said remonstrance, moved the court for leave to verify the remonstrance and re-file the same, and in support of their motion presented an affidavit in which it was, with other facts, stated that the remonstrance had been struck out by the court because it was verified by Matilda Parry alone, and that her subsequent withdrawal therefrom left it without verification, and that said ruling and action of the court had greatly surprised and wronged them, as they had relied upon the previous ruling of the court that the verification was, as to them, sufficient and all the law required, and that if they had supposed that any doubt existed as to its sufficiency, or had received any intimation from the court as to its insufficiency, they would have taken immediate steps to amend the remonstrance as to its verification. This motion was overruled by the court. And the appellant Munson also then appeared and presented his application, duly verified, for leave to file a remonstrance against the confirmation of said report, in which it was stated that the commissioners had been ordered to report their proceedings to the court on the first day of its next term, being the December term, 1881, thereof, at which time he, by his agent, appeared in

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court, where he remained for the three succeeding days, for the purpose of filing a remonstrance against the report of the commissioners in the event that his land was assessed by them for the construction of the drain, and as no report was then made by them, he supposed and believed that the proposed drain had been abandoned; that no opportunity had been afforded him until then to remonstrate against the report, although he was largely interested therein, as his land had been assessed over \$200 for the construction of the drain, when in truth and in fact its construction would be a positive damage thereto, and that the construction of the drain would not be of public utility or benefit any public highway in the county, nor conduce to the public health, and that the expense of its construction would exceed its possible benefits, and that if constructed as proposed it would not drain the lands assessed therefor; that he was a non-resident of the State, and that his application to file said remonstrance was made at the earliest time after discovering the fact that said report had been filed after the time fixed by the court therefor had expired.

The court refused to permit the remonstrance to be filed. An appeal to this court from the final order and proceedings of the court below was then prayed by Hosmer, Hildreth and Munson, but before the appeal was perfected Hosmer died, and thereupon Lucy A. Hosmer, as his sole devisee and executrix of his will, united with Hildreth and Munson in consummating the appeal, and they alone constitute the appellants herein. Hosmer and Hildreth have joined in an assignment of errors; while Munson has presented a separate assignment. The only available error assigned by Hosmer and Hildreth is the ruling of the court in striking out the remonstrance of Matilda Parry and others to the report of the commissioners; and the only available error assigned by Munson is the ruling of the court in refusing to permit him to file a remonstrance to said report.

Before considering these errors, it is necessary for us to dis-

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pose of a motion that has been interposed by the appellee to dismiss the appeal of Hosmer and Hildreth. The reasons alleged in the motion for its support are: 1st. That their co-remonstrants did not unite with them in the appeal, and have not been made parties thereto, as required by the statute; and, 2d. That the record fails to show that they were parties to the proceeding from which the appeal was taken.

The objection last named rests upon the fact that the remonstrance was signed "Hosmer & Hildreth," and by that name the proceeding, as to them, was prosecuted and defended, which, doubtless, occurred by reason of the fact that they were so designated in the assessment of their lands. They were not named, in any manner, either in the petition or notice. It is fair to assume that the appellants Hosmer and Hildreth are, or represent, the same parties as those so assessed, and, therefore, had the right to appeal, as they have, from the assessment. See *Houk v. Barthold*, 73 Ind. 21. The appellee waived his right to urge the objection first named by agreeing to the submission of the cause to this court for its consideration, without insisting that said co-remonstrants should be made parties to the appeal. The motion to dismiss the appeal is overruled.

The statute, in force when the remonstrance in this case was filed, provided: "Upon the making of such report" (referring to the report of the commissioners of drainage) "to the court, three days shall be allowed to any owner of lands affected by the work proposed, to remonstrate against the report; and any such remonstrance shall be verified by affidavit, and may be for any or all of the following causes," etc. R. S. 1881, section 4276. Under this provision of the statute, owners of lands so affected may, jointly or severally, remonstrate against the report of the commissioners of drainage. If they join in such remonstrance, any of them may afterwards, at their pleasure, withdraw therefrom, and thereby escape future liability for costs thereafter created in consequence of the remonstrance; but such action on their part will not defeat the

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remonstrance, nor impair or affect, in any manner, the right of the other remonstrants to proceed with the remonstrance the same as if no such withdrawal had occurred. See *Little v. Thompson*, 24 Ind. 146, where a similar question in a highway case was decided by this court. The statute does not require that the remonstrance shall be personally verified by the remonstrants; it may be so verified by them, or it may be verified by some person having authority to act for them. If it is verified by one or more, but not all, of the remonstrants, either personally or by agent, such verification will be treated and regarded as made by all of them, and if after the remonstrance, so verified, is filed, those who verified it withdraw therefrom, such act will not operate as a withdrawal of the verification, but it will remain unaffected thereby. It follows from the views above expressed, that the court below erred in rejecting the remonstrance because Malinda Parry, for whom it was verified, withdrew therefrom. We also think that the court erred in refusing to permit the appellant Munson to file a remonstrance against the report of commissioners. The statute provides that when a petition for the location and construction of a drain is presented to the court, and it is shown that notice of the intention to present the same was given as required by the statute, and that the provisions of the statute in other respects have been complied with, the court "shall make an order referring the matter to the commissioners of drainage of the county, and fix therein a time and place for the meeting of said commissioners, and a time when they shall report." R. S. 1881, sections 4274 and 4275. The provision of the statute requiring the court to designate a time for the commissioners to report is mandatory. Its purpose is evident. It is that owners of lands assessed for the construction of a drain may be afforded an opportunity to resist, by remonstrance, the confirmation of the report. The limited time allowed them by the statute to present such a remonstrance commences to run from the time the report is filed. By requiring the report to be filed at a designated time,

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the remonstrants will, in ample time, know when they can and must file their remonstrance. It is essential to the protection of their rights and interests that this provision of the statute shall be strictly enforced. The court in which the proceeding is pending may, for sufficient cause, extend or change the time designated in its original order for the making of the report. In this case, the court, in accordance with the provisions of the statute, did fix a time for the commissioners to report. The time fixed was the *first* day of the December term, 1881, of the court. No report was filed until the *twenty-seventh* day of the term. No order was made at any time by the court extending or changing the time so designated. Commissioners of drainage can not, under this statute, violate or ignore the order of the court fixing the time for the filing of their report, and present a report when it suits their pleasure or convenience. To permit them to do so would render the statute subject to great abuses. It would in many cases result in requiring the constant attendance in court of persons desiring to remonstrate against the report, and ceaseless vigilance on their part to avert action thereon in their absence. No such inconveniences or perils should be imposed upon them, and none will be imposed if the provision of the statute is, as it must be, complied with. If the commissioners, from any sufficient cause, are unable to report at the time fixed, it is their duty to advise the court of that fact, and procure an order from the court fixing another definite time for the making of the report, and this order should be made before or on the day first fixed for the filing of the report, so as to apprise those interested in the proceeding, either as petitioners or prospective remonstrants, of the time, as changed, when the report will be made.

It does not appear by the record in this case, that any objection was made to the filing of the report at the time it was filed, nor that any motion was made afterwards to reject the report because it was not filed at the proper time. It is too late to make such objections for the first time in this

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court. They should have been made at a proper time and manner in the court below. But as the appellant Munson was prevented by the wrongful action of the commissioners from filing a remonstrance to the report at an earlier period in the proceeding than the time when he presented it, the court should have permitted him to file it at that time. See *Breitweiser v. Fuhrman*, 88 Ind. 28.

For the errors of the court above named the order and proceedings of the court below should be reversed.

PER CURIAM.—The order and proceedings of the court below are reversed, at the costs of the appellee, and the cause is remanded to the court below with instructions to overrule the motion to strike out the remonstrance that was filed by Matilda Parry and others to the report of the commissioners, and to grant leave to the appellant Munson to file a remonstrance to said report, and for further proceedings in accordance with this opinion.

Filed March 14, 1885.

No. 12,027.

BESSETTE v. THE STATE.

WITNESS.—*Cross-Examination.—Practice.*—It is proper, on cross-examination, to propound questions showing the character and antecedents, and exhibiting the motives and interest, of a witness, for the purpose of affecting his credibility; but specific acts of immorality or misconduct of a witness can not be proved for the purpose of discrediting his testimony.

SAME.—*Discretion of Court.*—The extent to which a cross-examination may be carried is ordinarily a matter resting in the sound discretion of the trial court.

CRIMINAL LAW.—*Rape.—Locus of Crime.—Evidence.*—In a prosecution for rape committed upon a female child under the age of twelve years, where the prosecuting witness testified on her examination before a justice, that the crime was committed in a certain field, but on the trial of the cause in the circuit court testified that it occurred in the defendant's barn, it is error to reject evidence tending to show the motives inducing the change of the *locus* of the crime.

101	85
137	497
101	85
136	288
101	85
137	354
138	17
101	85
140	166
101	85
144	480
147	55
101	85
149	402
150	276
152	331
101	85
165	669

101	85
170	213

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SAME.—Prosecuting Attorney.—Argument of Counsel.—It is the duty of the trial court to control and direct the argument of counsel; and where the prosecuting attorney is permitted, over objection, to comment on the personal appearance of the defendant, not as a witness, nor on account of his manner and bearing as such, but as indicating a probability of guilt, or to refer to a particular juror as having become prejudiced in the case, it is such error as will reverse the judgment.

From the Benton Circuit Court.

D. Smith, R. P. Davidson and J. C. Davidson, for appellant.
F. T. Hord, Attorney General, for the State.

MITCHELL, J.—The appellant was convicted in the court below of having made an assault upon, and of having had carnal knowledge of, Lenora Bessette, a female child under the age of twelve years.

The conviction rests wholly upon the testimony of the prosecuting witness, who was the daughter of the appellant's brother.

It appeared that the brother and his wife had separated for some cause, undisclosed in the record, and that his wife was living, presumably in wedlock, with one LaBarge, and that her daughter, the prosecutrix, was also a member of LaBarge's family, he assuming the relation of step-father to her.

The evidence tended to show that the alleged offence was perpetrated about nineteen months before any information of the fact was given by the prosecutrix to any one. After the lapse of that period, the evidence tended to show that the prosecutrix and her step-father, LaBarge, went to the office of the prosecuting attorney, when, after consultation, an affidavit was prepared charging the appellant with the offence, and concurrently with the commencement of the criminal proceeding, a civil suit was instituted by her in the Benton Circuit Court for damages, LaBarge being named as her next friend.

After the examination before the justice, the grand jury of the county returned an indictment against the appellant for the same offence which was charged in the affidavit, and upon the indictment so found this trial was had.

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The evidence tended to show that upon the examination of the criminal charge had before the justice of the peace, the prosecutrix testified that the offence against her person was perpetrated by the appellant on the 10th day of May, 1882, in a certain field in which he was plowing, and that nothing was said or claimed by her at that examination as to any other similar occurrence, at any other time or place.

In her direct examination in this case, she abandoned the alleged occurrence in the field, saying nothing whatever about it, and testified that the abuse of her person occurred on a Sunday in May, 1882, in the appellant's barn, she having gone thither with him and two of his children, one of whom, a girl, was near her own age, to assist in watering the horses.

Having thus apparently changed her base, as to the place where the alleged offence was perpetrated, the appellant's counsel sought to develop the theory that the change was induced by the fact that a full view of the field in which she first testified the act occurred was commanded by the appellant's and also by a neighbor's house, and also by the fact that it could be made to appear that the appellant's hired man had plowed the field in the May referred to, and that the appellant had not plowed in that field at all at the time first laid.

The appellant, by his counsel, also undertook in the cross-examination of the prosecutrix to develop the theory that the relations between her and her step-father were of an improper character; that they were depraved in their conversation and conduct with each other, and that both the criminal and civil prosecutions were the result of a conspiracy between the two to extort money from the appellant.

As tending to support that theory, the prosecuting witness was asked on cross-examination whether she had not, on an occasion when absent from home with her step-father, occupied the same bunk with him; and whether or not she had not told persons, whose names were given, that her step-father had told her about matters relating to the begetting of children and commerce between the sexes, and other matters, which

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indicated, if true, an utterly debased and depraved condition of mind in both. She was also asked questions tending to show, or implying, that she had been led to expect a pecuniary advantage on account of the several prosecutions commenced against the appellant, and implying that she had been induced to commence the prosecutions by her step-father, in the hope or expectation of some such benefit.

These questions, and all others of like character, were, upon objection by the State, held to be improper, and these rulings of the court are complained of as erroneous.

The extent to which a cross-examination may be carried, in the direction indicated by the questions, is ordinarily a matter resting in the sound discretion of the *nisi prius* court.

The rule that specific acts of immorality or misconduct of a witness can not be proved for the purpose of discrediting him, is well settled and is not to be infringed upon, but that rule is not involved in the question under consideration. The question here is as to the extent to which a cross-examination of a witness may go, when the object of it is to impair his credibility by questions tending to show the motives or interest under which his testimony is given, or that he is depraved in character, or that his habits and antecedents are immoral and infamous. These are ordinarily collateral to the main inquiry, and can not become the subjects of independent proof from other witnesses, except in the manner provided by statute.

It is proper within the bounds of propriety, to be controlled by the trial court, that the character and antecedents of a witness may be subjected to a test on cross-examination, and that questions which go to exhibit his motives and interest as a witness, as well as those tending to show his character and antecedents, should be allowed. *Wharton Ev.*, sections 544, 545; *Johnson v. Wiley*, 74 Ind. 233; *Wilbur v. Flood*, 16 Mich. 40; *Commonwealth v. Bonner*, 97 Mass. 587.

The appellant also sought to introduce evidence tending to prove the situation of the field in which the prosecutrix,

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on her first examination, testified that the offence was perpetrated, and that his hired man had plowed the field, with a view of presenting the theory to the jury that the change in the *locus* of the crime was induced by the fact that she would be confronted with evidence tending to show the improbability of its having been committed there at all. This evidence was also excluded, and we think improperly.

It was the clear right of the appellant, having shown that the prosecutrix at first laid the injury as having occurred in the field, to show that a view of the field was so commanded by his own and neighboring houses as to render it highly improbable that the offence could have been committed there, and also to show that his hired man had plowed the field, and that he had not plowed it, as these facts would have tended to show a motive for making the change in her testimony.

A bill of exceptions in the record shows that during his closing address to the jury, the prosecuting attorney, in speaking of the accused, who had testified in his own behalf, used the following language: "Luke Bessette has a bad looking face; I ask you to just look at his face; you have a right to look at his face, and I have the right to ask you to look at his face, and as prosecuting attorney I have a right to comment upon it; if his face does not show him to be a bad man, then I am not a good judge of the human countenance."

To these remarks the appellant's counsel objected, and protested that they were improper. So far as the bill of exceptions shows, no notice was taken of the objection and protest of counsel by the court. After other remarks by the prosecutor, which are set out in the bill of exceptions and which were objected to, the bill contains the following, as part of the prosecutor's speech to the jury: "The defendant's attorneys have endeavored to humbug you into the belief that this case was set on foot for money; that this is a blackmailing scheme. The defence has already succeeded, perhaps, in making a young man on the jury believe that this is a blackmailing scheme. I think I know who he is, and I think he

has become greatly impressed with that theory." The bill of exceptions continues as follows: "To which language, and to alluding to any one of the jurors, the defendant at the time attempted to object, but the court having intimated that there should be no more interruptions by counsel, the objection was not noticed either by the court or prosecuting attorney."

The remarks indulged in by the prosecuting attorney, having reference to the personal appearance of the accused, not as a witness, nor on account of his manner and bearing as such, but relating to his personal appearance as an accused person before the bar of the court, can not be justified.

The personal allusion made to the probable state of mind of one of the jurors was yet more reprehensible. To be thus singled out from his fellow jurors, and put under surveillance, was well calculated to impair the independence of mind and judgment which it was the right and duty of the juror to maintain, until convinced by the evidence and the fair and legitimate argument of counsel.

It is the duty of the *nisi prius* court to control and direct the argument of counsel in the interest of justice, and when the prosecutor unconsciously, or, perhaps, from want of experience, went so far outside of the circle of fair debate as to attempt to degrade and humiliate the defendant, by arraigning him for his personal appearance and characteristics while he was by the compulsion of the court at its bar, it was the duty of the court to interfere for his protection.

Manifestly, this court can lay down no rule on the subject, and it will not in any case be presumed that the discretion committed to the trial court has been abused; yet, when it appears that harm may have come to a party by reason of a probable mistake on the part of the court in failing to act at all, when its intervention was necessary, as seems to have been the case here, this court will not hesitate to reverse.

It may sometimes happen, as for aught we know was the case in this instance, that in his zeal to do his duty the bounds of propriety may be unwittingly overstepped by an inexpe-

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rienced prosecutor, and while it would be a most ungracious task for this court to say anything which would in any degree suppress the highest enthusiasm of forensic effort in behalf of the State, or in any case at the bar, it should be remembered that fair, open debate, rather than a resort to questionable expedients, will best subserve the ends of justice.

To arrive at the exact truth and justice of the case according to the facts and the law should be the aim of all forensic strife, and to this end the utmost power of logical reasoning and deduction or proper illustration may be employed. To master and put them under contribution are the marks of the accomplished advocate.

It is not without regret that the court feels obliged to say this much, but looking at the whole record in this case, and considering that a conviction of the appellant was had on the not entirely consistent testimony of one unsupported witness, we feel constrained, lest injustice may have been done, to reverse the judgment, not so much upon any one, as upon all the questions which are made in the record, taken together.

Judgment reversed, with directions to the clerk to make the proper order upon the warden of the prison.

Filed April 3, 1885.

No. 11,542.

PAULEY ET AL. v. CAUTHORN.

BANKRUPTCY.—Assignee's Sale of Lands.—Prior Judgment Liens.—Where a sale is made by an assignee in bankruptcy subject to existing liens, and there are such liens antedating the filing of the petition in bankruptcy, they are not divested by the assignee's sale. A judgment creates a lien on the land of the debtor, and the lien is such that neither the adjudication in bankruptcy nor the assignee's deed will divest it. A discharge releases the bankrupt from personal liability on the judgment, but does not relieve the land from the lien.

SAME.—Judgment Lien.—Enforcement of Invalid Decree.—When a decree is without effect as against a judgment creditor, the holder of the decree

101	91
127	75
101	91
181	198
101	91
138	541

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can not maintain an action to enforce it, but his remedy is to bring suit to foreclose the equity of redemption of the judgment creditor.

MORTGAGE.—Foreclosure.—Parties.—The general rule is that there can be no valid decree of foreclosure unless the owners of the mortgaged property are parties to the foreclosure suit. The remedy of the mortgagee or his assignee is to foreclose the equity of redemption of all who are interested in the land as lien-holders or owners.

From the Knox Circuit Court.

G. G. Reily and *W. C. Niblack*, for appellants.

H. S. Cauthorn and *J. M. Boyle*, for appellee.

ELLIOTT, J.—It is alleged in the complaint of the appellants that they are husband and wife; that on the 26th day of November, 1875, Ira H. Pauley was the owner of a lot in the city of Vincennes, and on that day conveyed it by way of mortgage to William Ross to secure the payment of \$500, evidenced by a promissory note; that this mortgage was duly recorded on the 26th day of February, 1877; that on the 7th day of November, 1875, Edward Weisert recovered a judgment against Pauley for \$633.31 and costs; on the 24th day of August, 1878, Pauley filed a petition in the United States District Court praying that he might be adjudged a bankrupt; that such proceedings were had as resulted in an adjudication that he was a bankrupt; that on the 28th day of November, 1878, he secured a discharge in bankruptcy; that while the bankruptcy proceedings were pending, the lot was conveyed by the register to James L. Weems, the assignee in bankruptcy; that the assignee, pursuant to an order of the court, sold and conveyed the lot to Charles G. McCord on the 8th day of May, 1880, subject to the liens thereon; that on the 10th day of December, 1881, William Ross commenced a suit to foreclose his mortgage, but made no other persons parties except the appellants, obtained a decree of foreclosure, on which sale was made to Charles G. McCord and John T. Bayard for \$367.48; that by agreement between McCord and Bayard of the one part, and Ira H. Pauley, who acted for himself and his wife, of the other part, Bayard and

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McCord undertook to convey all of their interest in the property to Pauley; that pursuant to that agreement they did convey it to him; that as a part of the agreement Ross and Bayard and McCord made a sale and assignment of the decree to Pauley; that the assignment was evidenced by the following writing: "Received of Ira H. Pauley four hundred dollars in full of all claims which either of us have against the real estate herein described, and we each of us, in consideration of the said sum, forever relinquish, release and forever quitclaim any and all interest which any of us may have in the real estate described in said decree, and hereby direct the sheriff to return the same satisfied;" and that the decree was returned satisfied. It is also alleged that on the 9th day of September, 1882, Weisert by his attorney, the appellee, sued out an execution upon his judgment; that the sheriff levied it on the lot in controversy, sold it to the appellee, and issued to him a certificate of sale. The complaint prays that the cloud upon appellant's title created by the sale on Weisert's judgment may be removed, and that a decree of foreclosure issue in favor of the appellant.

Where a sale is made by an assignee in bankruptcy subject to existing liens, and there are such liens antedating the filing of the petition in bankruptcy, they are not divested by the assignee's sale. *Swope v. Arnold*, 5 Nat. B. R. 148; *Marshall v. Knox*, 8 Nat. B. R. 97; *Catlin v. Hoffman*, 9 Nat. B. R. 342; *Clark v. Iselin*, 11 Nat. B. R. 337; *Wilson v. City Bank*, 9 Nat. B. R. 97; *In re Gold Mountain Mining Co.*, 15 Nat. B. R. 545; *Haughton v. Eustis*, 5 Law Rep. 505.

A judgment creates a lien on the land of the debtor, and the lien is such as neither the adjudication in bankruptcy nor the assignee's deed will divest. The discharge in bankruptcy released the bankrupt from personal liability on the judgment, but it did not relieve the land from the lien. *Woodbury v. Perkins*, 5 Cush. 86; S. C., 51 Am. Dec. 51; *Buckingham v. McLean*, 13 How. 150; *Downer v. Brackett*, 21 Vt. 599; *In re*

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Jaycox, 8 Nat. B. R. 241; *Truitt v. Truitt*, 38 Ind. 16; *Pierce v. Wilcox*, 40 Ind. 70.

It results from these settled principles that Weisert's lien was not divested by any of the proceedings in bankruptcy, and it must also follow that the appellants can not prevail against the rights flowing from the lien of that judgment unless their rights acquired through McCord, Bayard and Ross are of such a character and so asserted as to nullify the sale to the appellee.

The lien of Weisert's judgment was not divested, although the discharge in bankruptcy released the judgment debtor from all personal liability. This lien continued from its inception to bind the property, although the personal liability of the debtor was extinguished by the discharge. At the time the foreclosure suit was instituted by Ross, the judgment creditor had a lien, and, like all lien-holders, an equity of redemption in the land. This equity of redemption could only be barred by a suit to which he was a party. He was not a party to the suit brought by Ross, and, consequently, his rights were not affected by it. The rights of Weisert were not divested by the bankruptcy proceedings nor barred by the decree of foreclosure. There was, therefore, nothing to prevent him from selling the land upon his judgment.

We need not inquire what the United States court might have ordered, for we know that the law protected the lien, and are informed by the record that the assignee was ordered to sell subject to the lien, and we must conclude that the lien on the land owned by the debtor when the petition in bankruptcy was filed continued unimpaired.

The appellants may have acquired some interest in the land, and may, perhaps, have acquired a right to enforce the mortgage lien, but, however this may be, they did not obtain a decree of foreclosure which they could enforce against the lien of Weisert's judgment. The owners of the land were not parties to the suit, and the general rule undoubtedly is that there can be no valid decree of foreclosure unless the owners

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of the mortgaged property are parties to the foreclosure suit. *Petry v. Ambroscher*, 100 Ind. 510; *Curtis v. Gooding*, 99 Ind. 45. It is quite clear that the decree was of no force against Weisert, for he was not a party to the suit, and if the decree was without force as to him, it is not possible to enforce it in the method here adopted. The result is, that conceding that the appellants could and did acquire an interest in the land, and still further conceding that they acquired the mortgage by an equitable assignment, yet their contention can not prevail, for what they demand is the enforcement of the decree, and as the decree was without validity, it can not be enforced. If the appellants have a senior right, their remedy is not the one they have chosen. The only remedy open to them, even if they are the owners of the mortgage, is to bring a suit to foreclose the equity of redemption of those interested in the land as lien-holders or owners. *Curtis v. Gooding*, *supra*; *Shirk v. Andrews*, 92 Ind. 509.

The purchase from the assignee in bankruptcy gave the grantors of the appellants title to the land, but it was a title subordinate to the lien created by Weisert's judgment. As that lien is senior to the title so acquired, the only method by which that lien can be rendered ineffective is by a suit to compel the judgment creditor to redeem from the mortgage constituting the senior lien.

Judgment affirmed.

Filed March 10, 1885.

 No. 12,070.

BARNETT v. FEARY.

LANDLORD AND TENANT.—*Lease.—Election of Tenant as to Longer Term.—Rescission.*—Where a tenant, who is in possession of farm premises under a lease for one year, with the privilege of three, prior to the expiration of the year notifies the lessor that he has rented another farm, and will at once vacate the premises held under such lease, and thereupon the former arrangement is mutually rescinded, such tenant thereby

101	95
138	190
101	95
139	278
101	95
168	476

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elects not to hold such premises longer than one year, and the tenancy is terminated at that time.

SAME.—Occupancy.—Notice.—In such case, the mere occupancy of the land at and after the expiration of the year can not be deemed an election to hold it for three years, in the face of an express notification of a different election, and after the opposite party has acted upon the same by leasing the land to other parties.

REAL ESTATE.—Action to Recover.—Landlord and Tenant.—Damages.—Evidence.—Where a tenant unlawfully detains possession of farm land during the season for sowing wheat, and so prevents the owner from using it for a wheat crop, in an action by the latter for possession and damages, evidence that the land is better adapted to wheat than corn is admissible.

SAME.—Rent.—In such case, evidence as to the rental value of the house situate upon the land, per month, during the time of the detention, is admissible.

SAME.—Proof of Value of Land.—Proof of the value of the land, in such case, during the time of its detention, is not necessary in order to entitle the plaintiff to recover.

WITNESS.—Credibility.—Cross-Examination.—Any fact tending to impair the credibility of a witness, by showing his interest or bias, may be elicited on cross-examination.

INSTRUCTIONS.—Harmless Error.—Practice.—There is no available error in a refusal to give an instruction to the jury which is predicated upon a fact which their answers to interrogatories show does not exist.

PLEADING.—Construction.—In construing a pleading with reference to an allegation of fact, all its averments relating thereto will be considered.

PRACTICE.—Pleading.—Harmless Error.—An error in overruling a demurrer to one paragraph of complaint will not reverse the judgment where it affirmatively appears that the finding was upon another paragraph.

From the Shelby Circuit Court.

E. P. Ferris, W. W. Spencer, J. S. Ferris and A. Akers, for appellant.

E. K. Adams and L. J. Hackney, for appellee.

BEST, C.—The appellee brought this action against the appellant to recover possession of the land in the complaint described, with damages for its detention and for waste alleged to have been committed thereon.

The complaint consisted of two paragraphs, to each of which a demurrer, for the want of facts, was overruled, and

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an answer in denial filed. Trial, verdict and judgment for the appellee. A motion for a new trial was overruled, and this ruling and the ruling upon the demurrer to the second paragraph of the complaint are urged as error.

This action was commenced on the 21st day of January, 1884, and the first paragraph of the complaint alleged that the plaintiff was the owner, was entitled to the possession of the premises in question, and had been since the 12th day of September, 1883; that since that time the defendant had unlawfully detained the premises, committed waste, etc., thereon.

The second paragraph alleged that the plaintiff, on the 12th day of September, 1882, by a written lease, a copy of which was filed, leased the premises to the defendant for one year, with the privilege of three; "that after the expiration of said year the defendant agreed with the plaintiff that he would take said farm for another year under said contract, and he continued in possession of said farm by virtue of that arrangement; that afterwards, to wit, about August 27th, 1883, he notified the plaintiff that he had rented another farm and would at once vacate her farm, whereupon by their agreement then made they mutually rescinded the aforesaid arrangement by which he was to remain on said farm for another year as her tenant;" that she thereupon rented said farm to two other persons, but that the defendant refuses to yield possession and unlawfully detains the same, etc.

The appellant insists that the averment in the second paragraph of the complaint, that "after the expiration of said year," etc., an arrangement was made to keep the farm a year longer, shows that he remained in possession under the lease for more than one year, and as such continued possession operated as an election to hold for the term of three years, his tenancy had not expired when this action was commenced, and therefore this paragraph was not sufficient.

If the averment in question was the only averment fixing the time when such arrangement was made, there would be

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much plausibility in the appellant's position, but it is not. There are other averments in the pleading that must be considered in connection with this one, and, when thus considered, the paragraph, fairly construed, avers that such arrangement occurred prior to the expiration of the first year. Such an arrangement operated as an election not to hold the farm any longer than a year, and such an election terminated the tenancy at the expiration of the year. The mere occupancy of the land at and after the expiration of the year can not be deemed an election to hold it for three years, in the face of an express notification of a different election, and after the opposite party had acted upon such notification by leasing the land to other parties.

If, however, we are mistaken as to the construction of this pleading, and the same is insufficient, the error in overruling the demurrer can not reverse the judgment. The jury, in answer to an interrogatory, found that the parties in August, 1883, rescinded the contract made by them as to the possession of the land after the first year, and as the finding of this fact supports the first paragraph of the complaint, if the second is unlike it, we think it may be said that it affirmatively appears that the finding was upon the first paragraph of the complaint. In such case an error committed in overruling a demurrer to some other paragraph of the complaint will not work a reversal of the judgment. *Blasingame v. Blasingame*, 24 Ind. 86; *Stanton v. State, ex rel.*, 82 Ind. 463.

The motion for a new trial embraced several reasons. These will be noticed in the order of their discussion. The first is that the verdict was not sustained by the evidence. This is based upon the assumption that the averment in the second paragraph of the complaint, heretofore mentioned, amounts to a conclusive admission that the appellant's possession of the premises for more than one year operated as an election to hold them for the period of three years. This position can not be maintained. There is no admission in such paragraph, when properly construed, as we think, that the appellant's

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term continued longer than one year. There being no such admission, the evidence showed that it terminated at the end of the year; indeed, the voluntary surrender of the possession by the appellant in February, 1884, seems to contradict his position upon this question. The evidence fully justified the verdict of the jury upon this point.

The appellant voluntarily surrendered the possession of the farm before the trial, and no judgment was rendered for its recovery, but a judgment of \$75 for its detention from the expiration of the year till the 14th day of February, 1884, when the possession was surrendered, was rendered. The detention of the farm during this time prevented the appellee from using it for a wheat crop, and she called witnesses to prove that the farm was better adapted to a wheat than a corn crop. This was proper. The jury might properly consider such fact in estimating the damages.

The evidence offered to show the rental value of the house per month during the time of the detention was also properly submitted to the jury.

The appellant's son, a young man twenty-one years of age, who was still living with his father, was called by him and testified in his behalf. Upon cross-examination the appellee asked him if he did not have the custody of, and was not assuming to own, all or nearly all the personal property owned by his father at the commencement of the suit. This was proper. Any fact tending to impair the credibility of the witness by showing his interest or his bias may be elicited on cross-examination. 1 Wharton Ev., section 567.

The objections taken to the third, seventh and eighth instructions raise the same questions that have already been decided against the appellant and we will not notice them more particularly.

The court refused to give the first instruction asked by the appellant. This was right. The instruction, among other things, stated that, in order to recover, "the plaintiff must prove by a fair preponderance of the evidence that she is en-

Hays et al. v. Wilstach.

titled to the possession of the real estate and the value of the same while it was unlawfully detained." This was wrong. Proof of the value of the land during the time of its detention was not necessary in order to entitle the appellee to recover possession, and therefore this instruction was properly refused.

The appellant asked the court to instruct the jury, that if they found that he continued in possession of the premises in dispute until the commencement of the suit, with the appellee's consent, such possession was not unlawful. The jury found in answer to an interrogatory, that the appellant's possession was not with the appellee's consent, and therefore, as the fact upon which the instruction was predicated did not exist, no available error was committed in refusing to give the instruction. *Kuhns v. Gates*, 92 Ind. 66.

This disposes of all the questions in the record, and as no error appears the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed Feb. 18, 1885; petition for a rehearing overruled June 10, 1885.

No. 11,983.

HAYS ET AL. v. WILSTACH.

APPEAL BOND.—*Liability of Obligors.*—*Rent of Land Pending Appeal in Action for Possession.*—The obligors upon an appeal bond, given by the defendant on appeal to the Supreme Court from a judgment for the possession of real estate, are liable for the amount of the money judgment, and for the rental value of the real estate pending the appeal.

SAME.—*Stay of Proceedings.*—*Consideration.*—The legal effect of an appeal bond, given by a defendant on appeal to the Supreme Court from a judgment against him for possession of real estate, is to stay proceedings upon such judgment, which is a sufficient consideration to bind the obligors.

From the Tippecanoe Superior Court.

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185
101
129

Hays et al. v. Wilstach.

S. A. Huff, R. P. Davidson, J. C. Davidson and W. F. Hays, for appellants.

A. W. Reynolds, E. B. Sellers, A. W. Caldwell and J. L. Caldwell, for appellee.

ZOLLARS, C. J.—In 1878, appellee instituted an action against appellant Hays for the recovery of the possession of real estate, and for damages for the detention thereof. Pending the suit, a receiver was appointed to take charge of all the real estate in controversy, except thirty acres, the possession of which appellant Hays retained. Upon the final hearing, judgment was rendered against Hays, in favor of appellee, for the possession of all the real estate, and for \$175 for the detention thereof. By the same judgment, the receivership was continued as to all the real estate, except the thirty acres, pending the appeal to the Supreme Court. From this judgment Hays at once appealed to this court, and filed an appeal bond, which was approved by the court. The judgment was finally affirmed by this court in 1882. *Hays v. Wilstach*, 82 Ind. 13. Pending the appeal, Hays remained in the possession of the thirty acres, undisturbed by any execution or writ of ejectment.

The present action is upon that appeal bond. The court below found the facts specially, and rendered judgment against appellants, as the principal and sureties upon the bond, for the amount of the money judgment in the former action, and for the rental value of the thirty acres pending the former appeal. From this judgment appellants prosecute the present appeal. They ask a reversal of the judgment upon two grounds: First. That the court below erred in charging them, as bondsmen, with the rental value of the thirty acres pending the appeal; and, Second. That although the judgment in the former suit was for the possession of the whole of the real estate, yet, as all of it, except the thirty acres, was left in the possession of the receiver, no writ of ejectment could have issued, and hence the bond did not stay pro-

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ceedings upon the judgment, and was, therefore, without consideration.

The first of these grounds presents the identical question examined and decided adversely to the position of appellants in the recent case of *Opp v. TenEyck*, 99 Ind. 345.

Conceding, without deciding, that pending the appeal, appellee might not have been entitled to a writ for the possession of the real estate left in the possession of the receiver, yet we know of no reason why, in the absence of an appeal bond, a writ might not have been issued upon the judgment and executed as to the thirty acres in the possession of Hays and the appellee put into the possession of it. As a matter of fact, proceedings upon the judgment were stayed by the filing of the appeal bond, and such, we think, without doubt, was the legal effect of the bond. The bond, therefore, was not without consideration.

As neither of the grounds urged for a reversal is tenable the judgment is affirmed with costs.

Filed March 31, 1885; petition for a rehearing overruled June 17, 1885.

No. 11,181.

DODGE v. KINZY ET UX.

HUSBAND AND WIFE.—*Mortgage of Land Held by Entireties.*—*Wife's Contract of Suretyship.*—*Construction of Statute.*—Where land is held by husband and wife as tenants by entireties, and where, since September 19th, 1881, the date of the taking effect of section 5119, R. S. 1881, the husband and wife executed a mortgage on such land to secure the payment of an individual debt of the husband, such mortgage, as to the wife, is a contract of suretyship, which she can not, under said section, enter into, and it is void both as to her and her husband.

From the Elkhart Circuit Court.

H. C. Dodge, O. Z. Hubbell, T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker and E. Daniels, for appellant.
J. M. Vanfleet, for appellees.

101	102
127	485
101	102
128	292
101	102
131	128
101	102
135	182
101	102
145	293
101	102
149	259

Howk, J.—This suit was brought by the appellant to foreclose a certain mortgage, alleged to have been executed by the appellees to one Abram Upp, on February 23d, 1882, on certain real estate, particularly described, in the city and county of Elkhart, and to collect the debt claimed to have been secured by such mortgage. The appellees jointly, and each of them separately, demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. Before the court made any ruling upon either of these demurrers, the appellees jointly filed their cross complaint against the appellant, wherein they asked that the mortgage, described in appellant's complaint, might be cancelled of record, and that their title to the mortgaged real estate might be quieted. To this cross complaint the appellant's demurrer, for the want of sufficient facts therein to constitute a cause of action, was overruled by the court, and, at the same time, the court sustained the appellees' demurrers to the appellant's complaint. Exceptions were saved by the appellant to each of the court's rulings adverse to him, and declining to amend his complaint or answer the cross complaint, the court rendered judgment against him, in appellees' favor, in accordance with the prayer of their cross complaint.

The facts of this case, as stated in the complaint and cross complaint, were substantially as follows: The real estate described in the mortgage, which the appellant sought to foreclose in this action, was conveyed on the 27th day of July, 1878, to the appellees, then and ever since husband and wife, by a deed regular in form, wherein they were designated as the grantees by the following description, namely: "To John S. Kinzy and Elizabeth A. Kinzy, husband and wife." On the 23d day of February, 1882, the appellee John S. Kinzy borrowed of Abram Upp the sum of \$1,000, and gave his note therefor, due in three years after its date, and, on the same day, both the appellees, John S. Kinzy and Elizabeth A., his wife, executed the mortgage in suit upon the real estate so owned and held by the mortgagors, under the afore-

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said deed of July 27th, 1878. Afterwards John S. Kinzy became insolvent, and, on April 25th, 1882, executed a chattel mortgage to said Abram Upp, as an additional security for the said sum of \$1,000, previously borrowed of said Upp by the said John S. Kinzy; and it was then agreed between him, Kinzy, and Upp, that the said sum of \$1,000, evidenced by the note above described, should at once become due. Afterwards certain other creditors of John S. Kinzy commenced suits against him, and, on April 28th, 1882, sued out orders of attachment in such suits, which became and were liens on the goods and chattels theretofore mortgaged as aforesaid by the said Kinzy to Abram Upp, as such additional security for the money so borrowed of him by the said John S. Kinzy. On his own application Upp was made a party to such suits in attachment, and such proceedings were thereafter had therein as that it was ordered by the court that the said sum of money, so borrowed by the said John S. Kinzy, should be repaid to Abram Upp out of the proceeds of the mortgaged goods and chattels so attached as aforesaid, and that he, Abram Upp, should thereupon assign his real estate mortgage to the appellant, Henry C. Dodge, as trustee for such attaching creditors of John S. Kinzy, all of which was done accordingly. In their respective suits the attaching creditors severally recovered personal judgments against the said John S. Kinzy for the amount of his debts, due them respectively.

It might be said, perhaps, that the real estate mortgage was only an incident of the debt of John S. Kinzy secured thereby, and that, as it appeared that such debt was fully paid off and satisfied, the mortgage was *functus officio* and extinguished, and nothing passed by the assignment thereof to the appellant as trustee. But the appellees' counsel, in his brief of this cause, rests the defence to appellant's action upon a single point, and, therefore, any other defence which might suggest itself or be suggested will be regarded as expressly waived. Counsel says: "I make no question about the right of the appellant to maintain this suit, in the form and at the

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time it was brought. The only question I do make is that the mortgage in suit was and is void."

This is the question we will briefly consider and decide.

It will be seen, from our statement of the facts of this case, that the land described in the mortgage in suit, more than three years prior to the date of such mortgage, was conveyed to the appellees, then and since husband and wife, by a deed regular in form, wherein they were thus designated as the grantees, to wit: "To John S. Kinzy and Elizabeth A. Kinzy, husband and wife." Where land is thus conveyed to husband and wife, the estate taken by the grantees is governed by the common law rule, which has never been changed by any statute in this State, but, on the contrary, is expressly recognized in sections 2922 and 2923, R. S. 1881, in force since May 6th, 1853. The rule is thus stated in *Davis v. Clark*, 26 Ind. 424: "At common law, if an estate is granted, as in this case, to a man and his wife, they are neither properly joint tenants, nor tenants in common, for husband and wife being considered one person in law, they can not take the estate by moieties, both are seized of the entirety *per tout* and not *per my*. Neither can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor." Accordingly, it was held in the case cited, that where land was thus conveyed to husband and wife, the husband did not take an estate in such land which he could convey or encumber by his own act or deed without the assent of the wife, or which could be subjected to sale on an execution against the husband. Such has been the uniform line of decision in this court upon the question under consideration. *Bevins v. Cline*, 21 Ind. 37; *Arnold v. Arnold*, 30 Ind. 305; *Chandler v. Cheney*, 37 Ind. 391; *Jones v. Chandler*, 40 Ind. 588; *Anderson v. Tannehill*, 42 Ind. 141; *McConnell v. Martin*, 52 Ind. 434; *Hulett v. Inlow*, 57 Ind. 412; S. C., 26 Am. R. 64; *Lash v. Lash*, 58 Ind. 526; *Patton v. Rankin*, 68 Ind. 245; S. C., 34 Am. R. 254; *Ed-*

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wards v. Beall, 75 Ind. 401; *Carver v. Smith*, 90 Ind. 22; S. C., 46 Am. R. 210; *Morrison v. Seybold*, 92 Ind. 298.

Certainly, there has never been an express repeal, by direct legislation, of the common law rule governing the conveyances of real estate to husband and wife. Repeals by implication are not favored in law, and when the courts hold that any statutory provision is repealed by implication, it is done because the legislative intent to supersede such provision is clearly manifested in the subsequent legislation. So, also, a statute in derogation of the common law must be strictly construed. *Water Works Co. v. Burkhart*, 41 Ind. 364; *Cruse v. Axtell*, 50 Ind. 49, 58; *Haas v. Shaw*, 91 Ind. 384; S. C., 46 Am. R. 607.

Under the common law rule, it is clear that at the date of the mortgage in suit, John S. Kinzy alone could not have executed a valid mortgage on the real estate described therein. But, perhaps, the mortgage executed by him and his wife would have been valid and binding on each of them under the rules of the common law, if the wife was not, at the time, prohibited by statute from entering into such a mortgage contract. In section 5119, R. S. 1881, in force since September 19th, 1881, and at the date of the mortgage now in suit, it is provided as follows:

"A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void."

The provisions of this section of the statute are too plain to be misunderstood. They positively forbid a married woman to enter into any contract of suretyship, in any manner, and as positively declare that any such contract, as to her, shall be void. In the case at bar, we need not argue for the purpose of showing that, in executing the mortgage sued upon, the appellee Elizabeth A. Kinzy entered into a contract of suretyship for the purpose of securing the individual debt of her husband, John S. Kinzy. This being so, and it can not be otherwise, the mortgage was void as to Elizabeth

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A. Kinzy under the statute; *Allen v. Davis*, 99 Ind. 216. Being void as to her, the wife, the mortgage was necessarily void as to John S. Kinzy, the husband; for, under the common law rule, he had no estate in the land described in the mortgage, which he could convey or encumber by his individual act or deed. In *Chandler v. Cheney*, *supra*, it was expressly held by this court, that a mortgage, executed by the husband alone upon an estate held by entireties by husband and wife, is absolutely void.

Our conclusion is, therefore, that the mortgage in suit was and is void as against each and both of the appellees, and that the court did not err in sustaining their demurrers to the appellant's complaint. This conclusion renders it unnecessary for us to consider the error assigned by appellant upon the overruling of his demurrer to appellees' cross complaint; for, in their brief of this cause, the appellant's counsel say: "The question to be decided is not complicated by the cross complaint." If the ruling by the court upon the demurrer to appellant's complaint is correct, the ruling on the cross complaint must perforce be correct.

We find no error in the record which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Jan. 23, 1884.

ON PETITION FOR A REHEARING.

HOWK, J.—An earnest petition for a rehearing has been filed in this cause on behalf of the appellant, and the questions thereby presented have been ably and exhaustively discussed by his learned counsel. A single question was considered and decided by this court in the original opinion herein. That question, it was held, depended for its proper decision upon the construction to be given by the court to the provisions of section 5119, R. S. 1881, in force since September 19th, 1881, wherein it is thus provided: "A married woman shall not enter into any contract of suretyship, whether as indorser,

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guarantor, or in any other manner; and such contract, as to her, shall be void."

Of the provisions of this section of the statute we say in the original opinion, and we adhere to what is there said, that they are "too plain to be misunderstood. They positively forbid a married woman to enter into any contract of suretyship, in any manner, and as positively declare that any such contract, as to her, shall be void." Placing this construction upon the provisions quoted of section 5119, we hold in our original opinion, that where land is held by husband and wife, as tenants by entireties, and where, since September 19th, 1881, the husband and wife have executed a mortgage on such land to secure the payment of an individual debt of the husband, such mortgage is, as to the wife, a "contract of suretyship," which, the statute says, she "shall not enter into," and declares that "such contract, as to her, shall be void." This is the point decided in the original opinion in this cause, and, as yet, we have neither heard nor read any reason or argument which has led us to doubt even the correctness of our decision.

But the appellant's counsel say in their argument, that if we adhere to our decision in this case, "then the end is not reached." Counsel claim that the logic of our decision will require us, when the case shall arise, to hold this: "That any mortgage of the wife, even of the lands of her husband, in so far as it binds her interest, is a contract of suretyship within the meaning of the statute, and as to her void." Such a result, however, is not required by any rule of law or logic of which we are informed. We need hardly say that there is a wide difference between the contingent interest of the wife in the lands of her husband, and the estate which the wife is seized of in lands held by her and her husband as tenants by entireties. So wide and marked is this difference that the rules of law and the decisions of the courts, in relation to the estate of husband or wife in lands held by both of them, as tenants by entireties, have not now, and never had, in this

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State, any application whatever to the contingent interest of the wife in the lands of her husband. It has always been the law in this State, that a wife could completely bar her contingent interest in the lands of her husband, by joining with him in the conveyance thereof "in due form of law." Section 2491, R. S. 1881; *Dunn v. Tousey*, 80 Ind. 288. Such contingent interest of the wife in the lands of her husband would never ripen into an estate therein, except in the event she survived her husband, and except, also, since August 24th, 1875, in cases of judicial sales of the husband's lands where her contingent or inchoate interest was not directed by the judgment to be sold or barred by the sale. Section 2508, R. S. 1881; *Taylor v. Stockwell*, 66 Ind. 505.

Where, however, lands are held by husband and wife as tenants by entireties, the wife as well as the husband is seized of the entire estate in such lands, "*per tout* and not *per my*." Sections 2922 and 2923, R. S. 1881; *Davis v. Clark*, 26 Ind. 424. The wife can not join with her husband in the execution of a mortgage on such lands, to secure the payment of the husband's debt; because, in so doing, she necessarily mortgages her own estate in such lands, and thus enters into a "contract of suretyship" in some manner, and such contract, as to her, is void under the statute. *Allen v. Davis*, 99 Ind. 216; *Allen v. Davis*, *post*, p. 187.

The petition for a rehearing is overruled, with costs.

Filed June 27, 1885.

No. 11,684.

HARPER v. STATE, EX REL. ADAMSON.

NEW TRIAL.—*Newly Discovered Evidence*.—*Bastardy*.—*Impeaching Evidence*.—*Admissions of Party*.—*Practice*.—Statements of the mother of a bastard child, some time after its birth, as to the identity of its father, can be used as impeaching evidence only in a bastardy proceeding, and not as an admission by a party to the action, and, therefore, will not, as a general rule, as newly discovered evidence, constitute cause for a new trial.

101	109
129	588
101	109
142	636
142	655
143	2
143	688
101	109
147	10
101	109
154	583
101	109
168	621

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SAME.—Cumulative Evidence.—A new trial will not be granted upon the ground of newly discovered evidence, when such evidence is merely cumulative.

SAME.—Affidavits.—Practice.—Supreme Court.—When newly discovered evidence is relied upon as a cause for a new trial, the affidavits supporting it must appear in the record in order to present any question in relation thereto in the Supreme Court.

SAME.—Misconduct of Jurors.—Presumption.—In the absence from the record of affidavits or other evidence tending to establish misconduct on the part of jurors, which is alleged as cause for a new trial, the Supreme Court will presume that the trial court did right in disregarding the same.

SAME.—Want of Certainty.—Where jurors, against whom misconduct is charged as a cause for a new trial, are not named or otherwise particularly identified, the charge is too indefinite.

INSTRUCTIONS.—Preponderance.—Practice.—When the jury are instructed that a preponderance of the evidence is necessary to entitle the plaintiff to recover, the inference is that if the evidence is equally balanced the verdict should be for the other side, and such instruction is not erroneous because it does not expressly state such proposition.

SAME.—An instruction which states the law correctly as far as it purports to go, is not erroneous because it might have gone further.

SAME.—Bastardy.—Paternity of Child.—Harmless Error.—Where, in a trial for bastardy, all the facts essential to a recovery are established by uncontradicted evidence, and practically conceded, except that of the paternity of the child, an instruction which directs the attention of the jury to that question specifically, is harmless to the defendant.

WITNESS.—Effect of Contradiction on Collateral or Immaterial Matter.—Where a witness is contradicted on some merely collateral or immaterial matter in a cause, his testimony as to material facts ought not, on that account, to be wholly disregarded.

From the Harrison Circuit Court.

J. H. Stotsenburg, D. W. Lafollette and W. W. Tuley, for appellant.

W. N. Tracewell, R. J. Tracewell and M. W. Funk, for appellee.

NIBLACK, J.—This was a prosecution, in the name of the State, and on the relation of Laura Adamson, against Abraham Harper for bastardy.

A jury found that the relatrix had been delivered of a bastard child, and that the defendant was its father, as charged.

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Numerous unavailing causes for a new trial were assigned and judgment followed upon the verdict.

The testimony of the relatrix and of the defendant respectively was irreconcilably conflicting, and very much of the evidence on both sides was either of an impeaching or a contradictory character.

Two of the causes assigned for a new trial were for newly discovered evidence. The first of these causes claimed that the defendant could prove by one Anna Denhart that a few weeks after the child was born the relatrix told her that one Gray was, and that the defendant was not, its father. Mrs. Denhart was alleged not to be a resident of the State when the motion for a new trial was made, and that circumstance was offered as an excuse for not filing her affidavit in support of the motion. Waiving all other objections to this cause for a new trial, it is sufficient to state that proof of such a fact as that proposed to be established by Mrs. Denhart has heretofore been treated by this court, and we think correctly, as impeaching evidence only, and hence not as an admission by a party to the action (*Thompson v. State, ex rel.*, 15 Ind. 473; *Dailey v. State, ex rel.*, 28 Ind. 285; *Tholke v. State, ex rel.*, 50 Ind. 355), and that, as a general rule, a new trial will not be granted simply to enable a party to impeach a witness. *Tholke v. State, supra*; *Evans v. State*, 67 Ind. 68; *Wall v. State, ex rel.*, 80 Ind. 146. There is nothing apparent in the present case to take it out of that general rule. The relatrix had been examined at great length at the preliminary trial before the justice in whose court the prosecution was instituted. There had been also a previous trial in the circuit court at which the jury had failed to agree. The general features of the cause must, therefore, have been familiar to the defendant when he entered upon the last trial. Then, too, several conversations with the relatrix similarly inconsistent with her testimony had been sworn to at the trial. The proposed testimony of Mrs. Denhart would, consequently, have been merely cumulative evidence, for which a new trial will not

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be granted. *Rains v. Ballow*, 54 Ind. 79; *Dodds v. Vannoy*, 61 Ind. 89.

The next cause for a new trial claimed that the defendant had discovered that the relatrix had also told one Fox that Gray was the father of the child, and that Fox would so swear if the cause should be again tried. But what we have said as to the insufficiency of the proposed newly discovered evidence of Mrs. Denhart, applies with equal force to this cause for a new trial. Besides, the affidavit of Fox, referred to as supporting this cause for a new trial, is not contained in or authenticated by the bill of exceptions, or otherwise made a part of the record. *Myers v. State*, 92 Ind. 390; *Applegate v. Baxley*, 93 Ind. 147. It follows that the circuit court did not err in overruling the motion for a new trial on account of newly discovered evidence.

Subsequent causes for a new trial charged misconduct on the part of three jurors during the trial, on one at one time, and on the remaining two at another, but there is no affidavit or other evidence in the record tending to establish the fact that any member of the jury was guilty of misconduct at the trial. We must, therefore, assume that the circuit court did right in disregarding the charges of misconduct against the jurors in question. *Buskirk Pr.* 254. Moreover, two of the jurors, to whom certain misconduct was imputed, were not named, or otherwise particularly identified, and for that reason the charge was too indefinite as to them.

The first instruction given by the court told the jury, amongst other things, that this was a civil action, and that the facts charged in the complaint must be established by what seemed to their minds to be a preponderance of the evidence to entitle the plaintiff to a verdict; that by certain rules, carefully enumerated and defined, they were to determine on which side the weight or the preponderance of the evidence was to be found.

It is argued that this instruction was erroneous, because it did not also inform the jury that where the evidence was

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evenly balanced, the verdict should be for the defendant, and because from the concluding part of it the jury might reasonably have inferred that a preponderance of evidence on the side of the defendant was necessary to defeat the action. When, however, the jury were told that a preponderance of the evidence on that side was necessary to entitle the plaintiff to a verdict, the plain inference was that if the evidence was equally balanced, the verdict would have to be for the other side.

While the concluding part of the instruction, which again referred to the weight or preponderance of the evidence, was not as carefully worded as it might have been, it did not materially break the force of that which preceded it, but left unmodified the proposition that a preponderance of evidence was required to enable the plaintiff to recover.

It is objected that the third instruction was confused and unintelligible, and hence misleading, but no specific reason is assigned in support of this objection, and hence no question is presented upon that instruction.

In its fourth instruction the court said, that "The jury, in determining the questions of fact in this case, should take into consideration the entire evidence introduced by the respective parties, but the jury are at liberty to disregard the statements of all such witnesses, if any there be, as have been successfully impeached, either by direct contradiction or by proof of having made contradictory statements at other times, or by proof of general bad reputation for truth and veracity in the neighborhood where they live, except in so far as such witnesses have been corroborated by other credible evidence, or by facts or circumstances proved on the trial."

It is claimed that this instruction was erroneous for not stating that a witness, contradicted by inconsistent conversations at other times, might not be effectively corroborated by proof of previous consistent statements. But the instruction was correct as far as it purported to go, and we have

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frequently decided that an instruction which states the law correctly to that extent will not be held to be erroneous because it might have gone further. *Garber v. State*, 94 Ind. 219.

The fifth instruction was as follows: "There seems to be no serious dispute between the parties as to the fact that the relatrix has been delivered of a bastard child, but of this fact you are to be the sole judges from the evidence. If she has been delivered of the bastard child mentioned in the complaint, * * * then there is but one fact left under the issues for your determination, and that fact is whether the defendant is the father of the child."

It is insisted that this instruction did not state the issues between the parties broadly enough; that there were other incidental and collateral matters, not referred to, which, under the issues, the jury were required to pass upon.

The instruction was not, perhaps, as aptly constructed as it might have been, but, as applicable to the evidence, it, in any event, did the defendant no injustice.

The only question seriously controverted at the trial was that of the paternity of the child. All other facts essential to a recovery in the action were established by uncontradicted evidence, and were practically conceded at the trial. *Carver v. Carver*, 97 Ind. 497.

Complaint is also made of the seventh instruction given to the jury. There may be some obscurity in the phraseology of that instruction, but we construe the instruction to have meant that where a witness is contradicted on some merely collateral or immaterial matter in a cause, his testimony as to material facts ought not, on that account, to be wholly disregarded, and, as thus construed, we see no objection to the instruction. 1 Greenleaf Ev., section 462.

The judgment is affirmed, with costs.

Filed April 1, 1885; petition for a rehearing overruled June 25, 1885.

Carbon Block Coal Company v. Murphy et al.

No. 11,492.

CARBON BLOCK COAL COMPANY v. MURPHY ET AL.

DEED.—Condition Subsequent.—Forfeiture.—Waiver.—Parol Assent to Breach.

—A condition subsequent in a deed of conveyance of real estate may be waived by one who has a right to enforce it, and a forfeiture may be saved though a condition has been broken, if the party having such right waives it, which he may do by acts as well as by an express agreement; but mere silence in or parol assent to an act which constitutes a breach of an express condition in a deed, does not amount to a waiver of the right of forfeiture for such breach.

SAME.—Pleading.—In an action to recover possession of and to quiet title to certain real estate for breach of a condition subsequent in a deed, an answer substantially showing the parol assent of an alleged agent to the act constituting the breach, and no consideration for the agreement, does not sufficiently allege a waiver thereof, and is bad on demurrer.

From the Clay Circuit Court.

G. A. Knight, C. H. Knight, T. L. Sullivan and A. Q. Jones,
for appellant.

C. F. McNutt, J. G. McNutt and S. W. Curtis, for appellees.

FRANKLIN, C.—This is an action by appellant against appellees for possession and to quiet title to certain real estate in the town of Carbon, Clay county, Indiana.

Appellee Murphy filed a separate answer in three paragraphs. The first (a denial) was withdrawn. A demurrer was sustained to the third and overruled to the second. Issue was joined on the second paragraph, a trial had by the court, finding for defendants, and over a motion for a new trial judgment was rendered upon the finding.

The complaint alleges, substantially, that appellant, on the 1st day of August, 1870, was the owner of certain real estate, describing it, and on that day it conveyed the same to one Witty; that the same had been successively conveyed through various persons down to appellee Murphy, in whom at the time of the commencement of the suit vested the legal title; that appellant's deed to the same contained the following condition:

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“ But it is expressly covenanted and agreed by and between the parties, and the estate hereby granted is upon the express condition, namely, that if the said party of the second part, his heirs, assigns or lessees, shall barter, sell or give away any spirituous or malt liquors by retail on the premises above described, to be used as a beverage, or shall suffer or permit the same to be done, or shall sell or barter, or suffer to be sold or bartered, spirituous or malt liquors in any quantity to be drank as a beverage on the premises above described, then the estate hereby created and conveyed, and all interest therein, shall become forfeited to the said party of the first part, and the said party of the first part shall be entitled to re-enter and take possession thereof, and hold the same absolutely and as if this conveyance had not been made.”

That in violation of the condition contained in the original deed of the appellant to Witty, the appellee John F. Murphy sold spirituous and malt liquors by retail on said premises to be used as a beverage, and suffered and permitted the same to be done; that said Murphy had a saloon on said premises, and was selling from day to day, or suffering to be sold therefrom, spirituous and malt liquors to be drank on the premises, etc. Whereby a forfeiture was claimed, and that possession was demanded and refused.

The second paragraph of the answer substantially alleges that before the bringing of this suit appellant had selected one John D. Walker to manage, control and watch over its business in the town of Carbon; that he accepted said agency and entered upon the duties thereof as prescribed by the company; that as one of his duties he had full control of the real estate belonging to said company, or in which said company had any interest, as well as to look after the lands sold to third parties, whose deeds contained a condition subsequent, providing for a forfeiture of all lands sold by said company forbidding and prohibiting the sale of intoxicating, malt or vinous liquors by any owner or occupant thereof; that, as alleged in the complaint, the defendant became the purchaser

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of one portion of the lands, described in the complaint, from third parties, and took a deed therefor, but without any condition in relation to a forfeiture, he at the time knowing nothing whatever of the condition contained in the deed from the company; but afterwards learning of said condition, after he had commenced the erection of the building spoken of in plaintiff's complaint, at which time knowing the position said Walker sustained to said company, he being empowered to waive the condition in said deed, asked and inquired of said Walker in regard to said condition of forfeiture, at which time he informed this defendant that the time the original conveyance to the company's first grantee had been so long that said company had determined not to attempt to enforce said condition, even though the same was good at law; that the attorney, Aquilla Jones, one of the company, and a stockholder in the same, and one King, another stockholder and director of said company, then at Carbon looking after the interests of said plaintiff, had told him that the company would not attempt to enforce said condition, and claim a forfeiture of the lands for a violation of said condition; that it would be all right, and for defendant to proceed and erect said building, said agent then knowing the purpose for which said building was being erected, and the purpose for which the same was to be used; that, relying upon the statements so made to him by said agent, and believing said statements were true, he did proceed to erect said building at an expense and cost of one thousand dollars; that had not said statements been so made by said plaintiff's agent, he would not have erected said building and invested his money therein.

It is very doubtful whether this paragraph sufficiently shows authority in the alleged agent to waive the condition in the deed. Doubtless "a condition may be waived by one who has a right to enforce it, and a forfeiture may be saved though a condition has been broken, if the party who has the right to avail himself of the same waives this right, which he may do by acts as well as by an express agreement. But a mere

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silent acquiescence in, or parol assent to, an act which has constituted a breach of an express condition in a deed, would not amount to a waiver of a right of forfeiture for such breach." *Lindsey v. Lindsey*, 45 Ind. 552, p. 567; 2 Washb. Real Prop. 16. A mere indulgence is never construed into a waiver of a breach of a condition. *Gray v. Blanchard*, 8 Pick. 284; *Jackson v. Chrysler*, 1 Johns. Cases, 125.

This paragraph of answer shows no consideration for an agreement, and all that is alleged could not amount to more than the parol assent of the alleged agent to the act constituting the breach, and if a waiver can not be made in this way, as is said by Washburn, *supra*, then no waiver is sufficiently alleged in the answer, and we think that to be the correct ruling. But whether the answer be good or bad, while there is a conflict in the evidence as to what statements said Walker made to appellee concerning the condition in the deed, there is an entire failure in the evidence to prove any authority in Walker to waive the condition in the deed, or that Jones or King had ever said anything to appellee in relation to the matter.

The evidence, without conflict, proves that one Tuttle was the plaintiff's agent at Carbon. Acting as such, he was its general superintendent, and had the charge and management of all its business there; that he had employed said Walker to collect some rents and to sell some lots on commission, and had paid said Walker for such services; that Walker was not an agent for the plaintiff in any respect, but was rendering some service for said Tuttle. Walker's business, during the time referred to, was that of an express agent and real estate agent on his own account. There was no evidence tending to show that he was a general agent of the plaintiff, or that he had any authority whatever, special or otherwise, from the plaintiff to waive said condition in said deed, and whatever he may have said to appellee in relation to the condition in said deed, could not amount to more than his individual opinion in relation to the matter, without any binding force whatever

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against the plaintiff. As to the material fact of authority in Walker to waive the condition in the deed, or estop the plaintiff from asserting a breach of the condition, there is an entire failure in the evidence. There is no pretence that Tuttle, who was appellant's agent, ever waived the condition in the deed, or ever said anything to appellee in relation to the matter; indeed, appellees were requested to say nothing to Tuttle about it.

Appellee admits the validity of the condition in the deed, and a violation of its terms, and relies upon a waiver of the condition for a defence.

We think the evidence does not sustain the finding, and that the court erred in overruling the motion for a new trial.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellees' costs, and that the cause be remanded, with instructions to the court below to grant a new trial, sustain the demurrer to the second paragraph of the answer, and for further proceedings in accordance with this opinion.

Filed March 12, 1885; petition for a rehearing overruled June 13, 1885.

No. 11,744.

MATHIS v. THOMAS.

CONTRACT.—*Tender.—Excuse for not Producing Money.*—A buyer, who contracts to make a tender at a specified time, performs his part of the contract if he goes to the house of the seller, who has no other place of business, on the day named, prepared to make a tender, and not finding him makes ineffectual search for him, but does not find him for several days afterwards, and then offers the money and is notified that it will not be accepted; and such refusal operates as an excuse for not actually producing the money.

TENDER.—*Effect of Refusal.*—A purchaser who has once made a valid tender of money, and is notified that the seller repudiates the contract, is not bound to make a second or subsequent tender.

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SAME.—*Sufficient if Money Present although in Possession of Third Person.*—

A tender is good if the money is present and the purchaser can secure it at once and immediately deliver it to the seller, although it may at the time be in the possession of a third person.

PLEADING.—*Real Party in Interest.*—In order to present the question that the plaintiff is not the real party in interest, it must be specially pleaded.

PRACTICE.—*Assignment of Cause of Action after Suit.*—Where the cause of action is assigned after the action is instituted, the action may be prosecuted in the name of the assignor.

From the Warren Circuit Court.

C. V. McAdams, for appellant.

W. L. Rabourn, J. McCabe and *E. F. McCabe*, for appellee.

ELLIOTT, J.—On the 25th day of July, 1881, the appellant executed to the appellee the following written agreement: "This is to certify that I have this day sold to W. B. Thomas all the corn on two hundred acres on my farm, now growing, at thirty cents per bushel, in crib, corn to be weighed on my premises, and said Thomas to have the use of my scales for weighing; and I further agree to have corn all husked and in crib by January 1st, 1882; Thomas to pay five hundred dollars November 1st, 1881, and balance of money by January 1st, 1882, or as soon as shelled and weighed." There was testimony that the appellee went to the appellant's house on the 29th day of October, 1881, and, not finding the latter at home, proffered the money to his wife and informed her on what account he tendered the money to her for her husband. On the following Monday, October 31st, a visit was again made to appellant's house, and he was still from home. On the 1st day of November, the money was taken to Williamsport where the appellant was engaged in building, but he was in an adjoining county. On the 3d day of that month the appellee, for the third time, went to the appellant's house for the purpose of paying him the \$500, but did not find him at home; he was, however, found at a place near by. We give the conversation between the parties in the language of one of the witnesses: "Thomas told him, Mathis, that he was ready to pay him the \$500, first due on

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the contract for corn; Mathis said he was too late, that it was to be paid on November 1st; Mr. Thomas told him about being at his house in time and not finding him; Mathis told Thomas he would not let him have the corn."

The court instructed the jury, in substance, that if the plaintiff went to the house of the defendant prepared to make a tender of the \$500, payable by the 1st of November, and was prevented from making a tender by the defendant's absence, it was the former's duty to make it as soon thereafter as he could reasonably do so. This was as favorable a statement of the law upon this point as the defendant had a right to ask.

The court did not err in instructing the jury that if the plaintiff was prepared to make the tender and was informed by the defendant that he would not receive the money, this would excuse its actual production. It is a familiar principle that where there is a refusal to receive the money, an actual tender is waived.

The first instruction asked by the appellant was correctly refused because not relevant to the case made by the evidence. It does not appear that the appellee made a conditional offer, although it does appear from the testimony of the appellant himself, that he said to the appellee that he would not deliver the corn because the tender was not made on the 1st day of November.

The rule which the second instruction asked attempted to state was well stated to the jury in the instructions given by the court, and there was consequently no available error in refusing it.

There was no error in refusing the third instruction asked by the appellant. If he once fully refused to perform his part of the contract, the appellee had a right to treat it as broken. Where one party notifies the other that he will not perform his part of the contract, there is no necessity for the other party to a second time offer performance. *Vinton v. Baldwin*, 95 Ind. 433, *vide* auth. p. 437. It is true that there

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are cases in which a subsequent offer by the party first refusing may require a renewal of the tender, but here there was no subsequent offer to perform. There was from first to last a repudiation of the contract by the appellant.

If the appellee had the money present, and could have put it into the hands of the appellant, it was all that the latter had a right to require. He can not object that the money was at the time in the actual custody of another person then present. If it was in the control of the appellee, so as to give him full power to transfer it at once to the appellant, he was in a situation to make a valid tender, and this was all that was required under the circumstances. It could make no difference to the appellant from whose custody the money came; the material things were the ability, readiness and willingness of the appellee to place the money in the hands of the appellant and vest him with full right and title to it. In this case the person who had the money was present with it and joined the appellee in his efforts to make an effectual tender, and the money was fully within the appellee's control and could at once have been completely transferred to the appellant. We see no just reason for permitting the appellant, on the ground of the insufficiency of the tender, to escape from his contract. *Harding v. Davis*, 2 C. & P. 77.

It is quite well settled that in order to present the question whether the plaintiff is the real party in interest, the defence that he is not must be specially pleaded. *Trentman v. Eldridge*, 98 Ind. 526; *Lamson v. Falls*, 6 Ind. 309; *Swift v. Ellsworth*, 10 Ind. 205.

Where the cause of action is assigned after the commencement of the action, the suit may be prosecuted in the name of the assignor, or the assignee may be substituted as plaintiff. *Keller v. Miller*, 17 Ind. 206; R. S. 1881, sec. 271.

We can not disturb the verdict upon the evidence.

Judgment affirmed.

Filed March 18, 1885.

Vaught v. The Board of Commissioners of Johnson County.

No. 12,182

VAUGHT v. THE BOARD OF COMMISSIONERS OF JOHNSON COUNTY.

101	123
137	557
101	123
138	47
101	123
137	142
138	614
139	614

NEGLIGENCE.—*Defective Bridges.*—*Board of County Commissioners.*—*Damages.*—Under section 2892, R. S. 1881, it is the duty of the board of commissioners of a county in this State to cause all bridges over which it has control to be kept in repair, and if it negligently suffers such a bridge to remain out of repair, and a person, in the ordinary use of the same, is injured in person or property, without any fault of his own, he can maintain an action for damages against such board.

SAME.—*Bridges Built and Maintained by Township.*—*Highway.*—Where a bridge, located upon and constituting a part of a public highway, has been built and maintained by township authorities, it is still the duty of the board of commissioners to see that it is kept in repair, and for failing in this duty it is liable, although it has never accepted, recognized, or in any way adopted the same as a county bridge. MITCHELL, J., doubts.

From the Johnson Circuit Court.

J. L. White and *W. J. Buckingham*, for appellant.

T. W. Woollen and *D. D. Banta*, for appellee.

COLERICK, C.—This action was brought by the appellant against the appellee to recover damages for injuries to his property, caused by a defective bridge. The issues were tried by the court, which, at the request of the parties, made a special finding of the facts in the case, and stated its conclusions of law thereon, as follows:

"1. In the year 1870, the township authorities of Franklin township, Johnson county, Indiana, constructed a bridge over Hurricane creek, forty-five feet long and fourteen feet wide, on the line of a public highway crossing said creek, running north and south on a line between two sections, from a gravel road on the south to a gravel road on the north.

"2. That said highway and bridge have been worked and kept in repair by the labor and funds of the road district and township, and that said highway and bridge have been constantly used and travelled by the public since the erection of

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the bridge in the year 1870, and said highway and bridge have been and are of great public utility and convenience.

"3. That the original cost of constructing said bridge was \$200.

"4. That previous to July 31st, 1883, the said bridge had been permitted to fall into decay, and on said date was greatly out of repair and unsafe for teams and horses to pass over it, and on said day the plaintiff, while travelling along said highway, drove upon the bridge with a team of horses and a wagon, and without any fault or negligence on his part, and exercising due and reasonable care, and by reason of the decayed and unsafe condition of the bridge, his two horses and wagon broke through the bridge, and his horses were bruised and injured, so that they were made less valuable by the sum of \$65, and he was deprived of their use and labor in the value of \$10, and that the above claim was filed before the board of commissioners of the county of Johnson, and refused, before the bringing of this action to recover the same.

"5. That said bridge had been built, repaired and maintained by the township officers alone, and the board of commissioners have never accepted, recognized, repaired, or in any way adopted said bridge as a county bridge.

"6. That the bridge had been out of repair for more than one year, which was a sufficient length of time to put them on their notice, if in law they were required to repair the same.

"CONCLUSIONS OF LAW.

"1. I conclude from the foregoing facts, that, the bridge being a township and not a county bridge, the defendant was not charged to maintain or repair the same.

"2. That plaintiff take nothing by his suit, and I find for the defendant."

To which conclusions of law the appellant, at the proper time, duly excepted, and thereupon the court, upon said finding of facts and conclusions of law, rendered a judgment against the appellant, from which he appeals to this court.

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The only question submitted for our consideration is, Did the court err in its conclusions of law?

The statute provides that "The board of commissioners of such county shall cause all bridges therein to be kept in repair," etc. R. S. 1881, section 2892. This provision of the statute has been in force since August 17th, 1855. See Acts 1855, p. 18, section 11. Under this statute, it is the imperative duty of the board of commissioners of a county in this State to cause all bridges over which it has control to be kept in repair, and if it negligently suffers such a bridge to remain out of repair, whereby a person, in the ordinary use of the same, is injured in person or property, without any fault of his own, he has an action against such board for damages resulting from the injury, although such action is not authorized expressly by statute. *House v. Board, etc.*, 60 Ind. 580 (28 Am. R. 657); *Pritchett v. Board, etc.*, 62 Ind. 210; *Board, etc., v. Pritchett*, 85 Ind. 68; *Board, etc., v. Deprez*, 87 Ind. 509; *Board, etc., v. Brown*, 89 Ind. 48; *Board, etc., v. Legg*, 93 Ind. 523; *Board, etc., v. Emmerson*, 95 Ind. 579; *Board, etc., v. Bacon*, 96 Ind. 31; *Patton v. Board, etc.*, 96 Ind. 131.

Upon the facts found by the court in this case, the appellee was liable to the appellant for the damages sustained by him. The bridge in question was under the control of the board of commissioners, and, therefore, it was bound to keep the bridge in repair, and can not escape liability by showing that the bridge had been built, repaired and maintained by the township officials alone, and had never been accepted, recognized, repaired, or in any way adopted as a county bridge by the board of commissioners. It was located upon and constituted a part of a public highway over which the board of commissioners had exclusive dominion, and it was the duty of the board to keep it in repair. This point was expressly decided by this court in *Board, etc., v. Bacon, supra*, where it was held that the failure of the township officials to keep such a bridge in repair is no excuse for the failure of duty on

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the part of the board of commissioners to do so, as it was incumbent upon that body to see that the bridge was kept in repair. The views there expressed by this court are in harmony with, and supported by, those stated in the cases of *Board, etc., v. Emmerson, supra*, and *Board, etc., v. Brown, supra*. In the first of the two cases last named it was held that "when either a township trustee or supervisor omits to give a bridge within his territory proper attention, it is the duty of these boards to cause the omission to be supplied without unreasonable delay." And in the case last named it was held that a primitive structure of logs or slabs, two feet above ground, built over a pond by road supervisors, was such a bridge as the county was bound to keep in repair.

The appellee calls our attention to the case of *Board, etc., v. Legg, supra*, as supporting the conclusion of law reached by the court below, that the appellee was not liable because the bridge was erected by the township authorities. An examination of the case will show that no such question was therein involved, and hence it is not in point. The later case of *Board, etc., v. Bacon, supra*, did directly involve the question, and is decisive of this case.

The court erred in its conclusions of law, and for the error so committed the judgment should be reversed.

PER CURIAM.—The judgment of the court below is reversed, at the costs of the appellee, and the cause is remanded, with instructions to the court to state conclusions of law upon the facts specially found in accordance with this opinion, and render judgment thereon in favor of the appellant for \$75 and costs.

MITCHELL, J., doubts.

Filed March 20, 1885.

Noble v. Board of Commissioners of Wayne County.

No. 10,716.

NOBLE v. BOARD OF COMMISSIONERS OF WAYNE COUNTY.

COUNTY CLERK.—*Compensation for Official Services.*—Before a county clerk is entitled to demand compensation from the county treasury for services performed by him in his official capacity, he must show, first, a statute authorizing him to receive compensation for such services and fixing the amount thereof, and, second, a statute authorizing the county commissioners to pay for such services out of the county treasury.

From the Wayne Circuit Court.

H. C. Fox, for appellant.

MITCHELL, J.—On the 6th day of June, 1882, William T. Noble, clerk of the circuit court for the county of Wayne, filed with the auditor the following account or claim:

“Wayne County, Indiana:

To WILLIAM T. NOBLE, Dr.

Statistical reports of marriage, March 50, April 50,

May 50	\$1.50
Three certificates for same, with seal, 50	1.50
Order to draw jury 10, index 10, certificate 5070
44 certificates to auditor for jurymen, 50	22.00
Venire for jury (under seal)75
Four appointments judge <i>pro tem.</i> , and certificate, 75	3.00
Record of marriages for board of health for y'r	12.50
85 civil order-book entries and orders 10c	8.50
74 probate order-book entries and orders 10c	7.40
28 criminal order-book entries and orders 10c	2.80
Filing 54 miscellaneous papers 5c	2.70
2 certificates of election of justices of peace to secretary of state 50	1.00
4 certificates of board of equalization, record and copy to each	6.00
Filing 250 election papers, consisting of tally-sheets, poll-books and certificates, 5c	13.25

\$83.60”

101	197
135	278
197	280
101	127
147	182
101	127
149	151
101	127
180	628
180	632

Noble v. Board of Commissioners of Wayne County.

Of this account the board of commissioners allowed items amounting to about \$30, and disallowed others amounting to \$53.65. From the order of the board the clerk appealed to the circuit court, where the case was submitted for trial on an agreed statement of facts, in which statement it was admitted that the services charged for were rendered. The court refused to allow any part of the claim, and the case is before us on appeal.

Before the appellant is entitled to demand compensation from the county treasury for services performed by him in his official capacity, it is necessary for him to show: 1. A statute authorizing him to receive compensation for such services, and fixing the amount thereof. 2. A statute authorizing the county commissioners to pay for such services out of the county treasury.

It was decided as early as *Rawley v. Board, etc.*, 2 Blackf. 355, and it has been the law ever since, that a county can not be liable for the fees and charges of officers without an express statute on the subject. *Board, etc., v. Blake*, 21 Ind. 32; *Board, etc., v. Templer*, 34 Ind. 322; *Taylor v. Board, etc.*, 67 Ind. 383; *State, ex rel., v. Wallace*, 41 Ind. 445; *Wright v. Board, etc.*, 98 Ind. 88.

In the absence of a statute, a county is liable to pay fees and charges to the clerk precisely in the same manner that an individual is, and not otherwise, and except where a statute expressly authorizes the boards of commissioners to make allowances to him for services which he performs in the course of his official duties, they have no more authority, and are under no greater liability, to pay him for such services, than to pay for any other services not performed for the county. We have been unable to find any statutes which fix any compensation for the clerk for performing any of the services above specified, or which authorize the county boards to pay for such services out of the public treasury, and as neither the appellant nor his counsel have pointed out any law for either, we have some confidence that none exists.

The judgment is affirmed.

Filed March 18, 1885.

Teter v. Teter.

No. 11,619.

TETER v. TETER.

101	199
136	46
101	129
144	190

101	129
169	78

MARRIAGE.—Presumption.—Rights of Children.—The presumption in favor of marriage and the legitimacy of children is one of the strongest known to the law, and in favor of a child asserting its legitimacy this presumption applies with peculiar force.

SAME.—Solemnization.—Violation of Statute Requiring License.—No ceremony or solemnization is necessary to validate a marriage, and a marriage is not rendered void by a failure to comply with a statute requiring the parties to obtain a license, though such failure may subject them to a criminal prosecution.

SAME.—Consent.—What Constitutes.—Where there is an agreement to form a present matrimonial connection, followed by cohabitation as husband and wife, no particular form of words is essential, provided it appears that the engagement was entered into from pure motives, and that the connection was not entered into from bad motives or for the mere purpose of sexual commerce.

SAME.—Evidence.—Legitimacy of Children.—Where a child asserts its legitimacy, and another child, in order to obtain property, asserts its own illegitimacy, it will require strong evidence to overcome the presumption of marriage, and where the evidence shows that the engagement of the parents was entered into from good motives and in the belief that there was no impediment to the marriage, and is followed by continued and open cohabitation as husband and wife after all impediments are removed, and by the execution of deeds as husband and wife, the presumption will not be overborne by the general statement that the parties were not married, but such statement will be construed to mean simply that there was no formal marriage ceremony.

From the Hamilton Circuit Court.

R. Graham, J. S. Frazer, W. D. Frazer, T. J. Kane and T. P. Davis, for appellant.

R. R. Stephenson, L. O. Clifford, G. Shirts and W. R. Fertig, for appellee.

ELLIOTT, J.—William H. Clayton and Mrs. Hannah A. Teter, a widow, entered into a contract of marriage, and on the 18th day of May, 1871, a license was obtained from the clerk and the marriage duly solemnized. Clayton had been

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previously married, but he believed, in good faith, that the former marriage had been dissolved, and there were reasonable grounds for this belief, for he had been so informed by those who were in a situation to possess full information, and the announcement that a divorce was granted was in fact made, and was noted on the record of the court of common pleas of Muskingum county, Ohio, in a suit brought by his former wife. The decree, however, was never formally entered, and the suit was dismissed because of a failure to pay the costs. Mrs. Teter believed that there was no impediment to the marriage between her and Clayton, and the evidence leads to the inference that she died in that belief. The parties lived and cohabited together as husband and wife; they were so regarded by the community; they so held themselves out; a mortgage was executed by them as husband and wife; a child, the appellee, was born to them in October, 1874, received his father's name, and was always recognized as the child of lawful wedlock. In September, 1871, Clayton's former wife, Dora, did obtain a decree of divorce in the Greene Circuit Court of this State, and he testified that neither he nor the appellee's mother had reason to believe that there was any legal impediment to their marriage; that they continued to live together as husband and wife until her death, in 1877; but he also testified that they were married but once, and that this was on the 18th of May, 1871. Mrs. Teter, at the time of her marriage to Clayton, held the land in controversy in virtue of her first marriage with George H. Teter, who died in 1863, leaving as his heirs his wife, Hannah A. Teter, and his son, John H. Teter, the appellant.

The appellee's contention is that the marriage of his mother to his father, William H. Clayton, was absolutely void; that the land which descended to her from her first husband remained in her, and that he inherits it as her illegitimate child. The appellant's contention is that there was a marriage, and that his mother was Clayton's wife at the time of her death, and that the land is his, under the rule that the children of

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the first husband inherit to the exclusion of the children of a second marriage, in cases where the mother dies during the second marriage the owner of land vested in her by descent from her first husband. This rule was approved when the case was in this court for the first time. *Teter v. Clayton*, 71 Ind. 237. At that time the appellee asserted his legitimacy, and claimed title, as a legitimate child, through a decree rendered in a partition suit, but he was defeated upon the ground that a decree in partition does not create title.

The appellee's success in this case depends upon the establishment of his own illegitimacy and his parent's shame. It will also require that we give to our statute an operation that will place the child of adulterous intercourse in a better position than one born in lawful wedlock, for, if the mother's illegitimate child be declared her heir, he takes a better position than a legitimate child, and succeeds to property vested in her in virtue of her first marriage, and partially excludes the child of the man through whom she derived her title, and he thus secures a more favored position than a child of a second lawful marriage can possibly attain. The effect of such a doctrine would be to favor children born bastards, to the exclusion of the issue of a lawful marriage. Public policy and justice seem to require that a child of adulterous intercourse should not be more highly favored than the child of lawful wedlock. The policy of our legislation is to keep the property vested in the wife by virtue of her first marriage beyond the reach of a second husband, and, surely, this policy ought to extend to the influence of a paramour, who has gained her affections. If the law with sedulous care guards the wife against the influence of a second husband, it should guard her with no less vigilance against that of a man whose relationship is as close as that of a husband, but is unsanctioned by morality or law. These considerations are important here, even though we do not undertake to follow them to their ultimate results, for they impress us, as they must every one, with the wisdom and justice of the rule, that the presump-

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tion in favor of matrimony is one of the strongest known to the law. This presumption we stated and enforced when the case was last here, and we are not now inclined to relax its force or remit its rigor in the slightest degree. *Teter v. Teter*, 88 Ind. 494. Where the child of the first marriage asserts the validity of his mother's second marriage, and a child born to her of an asserted marriage with another man affirms its invalidity, and that he is himself the offspring of an adulterous connection, the presumption should be extended to its utmost verge.

In the last decision made by this court in this controversy, it was held that there was no valid decree of divorce rendered by the court of common pleas of Muskingum county, in the suit instituted by Clayton's former wife, for the reason that the suit was dismissed before a final judgment had been entered, and we were bound to presume that the judgment of dismissal was right. It was also held that the decision in *Light v. Lane*, 41 Ind. 539, required us to decide that if the man had a living wife, his subsequent marriage was void. We held further, that the presumption, in favor of the validity of marriage in cases where the parties acted in good faith and cohabited as husband and wife, believing that there was a valid marriage, was one of very great strength, and that it was not overcome by the evidence adduced on the former hearing. We did not decide what evidence would be sufficient to overcome that presumption; we did no more than decide that the evidence then before us did not do it. In affirming that evidence is not sufficient to carry down a presumption, it is neither expressly nor impliedly affirmed that a certain quantity or quality of evidence will do it. In affirming that a certain quantity of powder is not sufficient to propel a ball to a given point, there is no determination of the question of how much will be required to carry the ball to that point. In deciding that there is not sufficient evidence to establish guilt, a court does not necessarily decide what evidence will produce that result. The question now presented was not settled by the former decision.

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It is important to ascertain the status of the person who asserts the validity of the marriage. In this case the person who does this is free from all taint of wrong; he is asserting his mother's innocence of evil, and maintaining his right to property acquired by his father. If any right is lost to him it results from no wrong of his, but solely from the misconduct of another. He is, therefore, in a position to insist upon a full and broad application of the rule, that "the law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy." *Hynes v. McDermott*, 91 N. Y. 451; S. C., 43 Am. R. 677. The son of the former marriage occupies a much more favorable position than one who had been guilty of either positive wrong or culpable negligence. It would be a wide departure from the true principles of justice to allow him to be shorn of his rights because his mother had been guilty of a moral wrong, and such a result should be avoided unless the clear words of a statute, or long settled rules of law, compel the courts to go to that length. It would be difficult to find any principle of natural justice that would justify a court in compelling a surrender of rights by one without fault at the demand of one who pleads his mother's wrong and his own illegitimacy as the ground of his claim to the property which is the subject of the controversy. We are firmly impressed with the belief that it is our duty to carry the rule, of which we have spoken, to its full extent, and hold that the continuous living together as husband and wife of Mr. and Mrs. Clayton, their acts as such, their well founded belief in the validity of their formal marriage, the husband's recognition of that relation after the divorce obtained by his first wife left him free to enter into a matrimonial engagement, the second wife's firm faith from first to last that she was lawfully married, the declarations of the parties that they were married, the acknowledgment of the appellee as the child of the marriage bed, create a presumption of marriage too strong to be overcome by the general statement of the husband, when on the witness stand,

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that there was only one marriage. Our conclusion is dictated by sound principles of public policy, and just principles of morality. We violate no rule of law in holding this. There was a time when no impediment to Clayton's second marriage existed, and the strong and almost conclusive presumption from the facts developed by the evidence is, that there was present in the minds of the parties the mutual consent which gives validity to marriages even though there is no formal solemnization. It is not the formal ceremony that creates the marital relation. If the matrimonial engagement is entered into from pure motives, and the connection is not formed for the purpose of illicit sexual commerce, there may be a valid marriage although there is no formal celebration. The intention to assume the relation of husband and wife, attended by pure and just motives, and accompanied by an open acknowledgment of that relation, is sufficient to constitute a marriage. An adulterous connection, entered into without any intention to marry, can not operate as a valid marriage, but a connection, formed from pure motives and entered into with the intention of creating the relation of husband and wife, may establish such a marriage as the law will respect. Persons may be punished for not obtaining licenses to marry, or for not taking steps to secure a proper record of the marriage, but there may, nevertheless, be a valid marriage. The want of form, or the lack of ceremonial rites, does not impair a marriage contract, in cases where it is entered into from good motives and with an intention to contract a present marriage, and is followed by an open acknowledgment of the marital relation.

We said when this case was last here, that little, if any, formality was required in the marriage ceremony, and we now say that no formal ceremony is necessary, and that if the motives are good, the intention to effect an immediate marriage is present, and the purpose to unite as husband and wife exists in the minds of both parties, mutual consent is all that is required. A text-writer, in speaking of marriage, says: "We

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maintain that the latter is the correct legal view; and that it should be said that the law requires in such cases a simple expression of mutual consent, and no more." Schouler Domestic Relations, section 25. At another place this author quotes from an English judge the following: "A marriage is not every carnal commerce; nor would it be so even in the law of nature. A mere carnal commerce, without the intention of cohabitation and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation,—that, in a state of nature, would be a marriage; and, in the absence of all civil and religious institutions, might safely be presumed to be, as it is properly called, a marriage in the sight of God." *Ibid*, section 26. Chancellor Kent says: "No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required." 2 Kent Com. 87.

In *Hutchins v. Kimmell*, 31 Mich. 126 (S. C., 18 Am. R. 164), COOLEY, J., speaking for the court, said: "Whatever the form of the ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage." This is the view taken by the great majority of the American courts. *Meister v. Moore*, 96 U. S. 76; *Dickerson v. Brown*, 49 Miss. 357; *Port v. Port*, 70 Ill. 484; *Lewis v. Ames*, 44 Texas, 319; *Dyer v. Brannock*, 66 Mo. 391; S. C., 27 Am. R. 359; *Campbell v. Gullatt*, 43 Ala. 57; *Askew v. Dupree*, 30 Ga. 173.

This general doctrine extends so far as to sustain the validity of marriages made without complying with forms prescribed by statute, for it is held that such marriages will be sustained unless the statute expressly declares them void. *Meister v. Moore*, *supra*; *Dyer v. Brannock*, *supra*. If this be the rule where the common law doctrine prevails, there

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can be no doubt that it is the rule under a liberal statute like ours, which declares marriage to be a civil contract. The conclusion from these authorities is that the question whether there was or was not a marriage depends entirely upon the motives, intention and agreement of the parties, and not upon any mere matters of form or ceremony.

Consent is essential to the existence of a valid marriage, but it need not be evidenced in any particular form; if marriage was intended, and the circumstances show that the parties assumed to enter into that relation, consent will be inferred. Bishop says: "Not even words are in all circumstances necessary. Or it is sufficient that the parties, in language mutually understood, or by anything declaratory of intention, accept of each other as husband and wife. Even, as Swinburne observes, if the words do not of their natural meaning or by common use 'conclude matrimony,' yet, if the parties intend marriage, and their intent sufficiently appears, 'they are inseparable man and wife, not only before God, but also before man.'" 1 Bishop Marriage and Divorce, section 229. There can be no doubt that the parties in this instance never contemplated anything else than marriage, and the mutual consent was manifested in the formal marriage of 1871, and was clearly expressed in the declarations and conduct from that day until the relation was dissolved by Mrs. Clayton's death. The circumstances lead with almost irresistible force to the conclusion that the mutual consent to marry was given after, as well as before, the divorce was obtained by Clayton's first wife. If no form of words is essential to express the consent when the marriage is first contracted, we can see no reason why any should be needed to continue the relation after the removal of an impediment existing at the time of the formal celebration of the marriage. It would be more consistent with logical principles to hold that the subsequent cohabitation as husband and wife is referable to the consent expressed at the commencement of the connection between the parties, than to hold that it was an adulterous commerce, unsanctioned by

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marriage. The reasoning, and, indeed, the decisions, of some of the courts, go very far in this direction. *Donnelly v. Donnelly*, 8 B. Mon. 113; *DeThoren v. Attorney General*, L. R. 1 App. Cas. 686; *Physick's Estate*, 4 Am. L. Reg. (N. S.) 418; *Fenton v. Reed*, 4 Johns. 51; *Rose v. Clark*, 8 Paige, 574; *Jackson v. Claw*, 18 Johns. 345; *In re Taylor*, 9 Paige, 611; *Schouler Dom. Rel.*, section 26.

But we are not required in this case to go so far as to hold that the party denying the validity of the marriage must prove that it was repudiated before or after the removal of the obstacle to its validity; all we need do is to decide that the general statement of Clayton is not in itself sufficient to overcome the presumption that the connection between the parties was the lawful one of husband and wife, and not the immoral one of adulterous commerce.

The general statement of Clayton that there was no marriage does not outweigh the facts elsewhere revealed in his own testimony. It is perfectly clear that he did not mean that there was no marriage arising out of an agreement, but that he meant that there was no formal second marriage. It is but justice to him to assign this meaning to his testimony. It is not unusual to use the word "married" as signifying the ceremony, and this we think was the sense in which it was employed by Clayton. The utmost that can be inferred from his testimony is, that there was no second formal celebration of the marriage. As no formal solemnization was needed, the fact that none took place does not overthrow the presumption of marriage. According to Clayton's own testimony nothing was wanting to a valid second marriage except its formal celebration.

Upon the facts the law is with the appellant. Judgment reversed.

Filed March 21, 1885.

Waller v. Wood.

No. 11,729.

WALLER v. WOOD.

BOARD OF HEALTH.—*County Commissioners.*—*Secretary.*—Under the statute, R. S. 1881, section 4993, the county commissioners constitute the board of health of the county, and a physician who is selected by the county board of health as its secretary is entitled to such compensation from the county treasury as such board may determine.

SAME.—*Compensation, How Paid.*—When the secretary's compensation is determined by the board of health, it is the duty of the county commissioners as such to cause it to be paid out of the county treasury by the auditor's warrant for the amount on the treasurer.

SAME.—*Presumption.*—*Supreme Court.*—Where the county commissioners made an allowance to the secretary of a board of health, the Supreme Court will presume, in favor of the ruling of the circuit court dismissing an appeal therefrom, that the board of health had determined the amount of his compensation, and that the allowance was made by the county commissioners in payment of the same.

SAME.—*Query.* Whether the allowance by the county commissioners to the secretary of the county board of health is not of itself a determination of the amount of such compensation within the meaning of the statute.

SAME.—*Appeal.*—*Discretion of Board of Health.*—No appeal lies from an order of a county board of health fixing the compensation of its secretary, the statute creating boards of health investing them with discretionary power in that regard, and making no provision for appeal.

From the Steuben Circuit Court.

S. A. Powers and *G. B. Adams*, for appellant.

J. A. Woodhull and — *Brown*, for appellee.

BEST, C.—The appellee filed the following verified claim against the county :

"STEUBEN COUNTY, INDIANA,

"To *H. D. Wood, Dr.:*

"As health officer Steuben county, for the year 1883, \$250."

This claim was allowed by the board of commissioners, and from such order the appellant, who was a taxpayer of the county, and who felt aggrieved by the decision, appealed to the circuit court. The appeal, upon motion, was there dismissed, and here such ruling is assigned as error.

It is obvious that this claim was for services rendered as

101	188
124	2
126	470
101	188
136	505

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“health officer” of said county, under and by virtue of section 4993, R. S. 1881. This section is in these words:

“The trustees of each town, the mayor and common council of each incorporated city (except where a regular constituted board of health, by ordinance of such city, now exists or may hereafter be created), and the board of county commissioners of each county shall constitute a board of health, *ex officio*, for each of the several towns, cities, and counties respectively of the State, who shall perform such duties respectively required of them by this act without compensation. They shall annually, in the month of January, complete their organization by the election of a secretary, who shall be a physician. The secretary of such local boards of health, and the secretary of any regular constituted board of health of any incorporated city, shall be the health officer of every town, city, or county, respectively, for the purposes provided in this act, and shall be allowed such compensation from the town, city, or county treasury, respectively, as the board electing them may determine: *Provided*, That the secretary of each county board of health shall render such medical and surgical services as may be required by persons confined in the county jail of such county, and such other medical services as may be required of him by the board of county commissioners.”

By virtue of this section, a physician, who is selected by the county board of health as its secretary, is entitled to such compensation from the county treasury as such board may determine. This the appellant concedes, but insists that the authority to make such officer an allowance for such compensation is conferred upon the board of health, and not upon the board of commissioners, and as the allowance in this case was, therefore, unauthorized, any person interested and aggrieved might appeal therefrom under the general statute authorizing appeals from the board of commissioners. This position can not be maintained. The statute above recited does not confer any authority upon the board of health to

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make such allowance. It simply authorizes such board to determine the amount of compensation, and when determined the duty rests upon the board of commissioners to cause it to be paid out of the county treasury. This is done by an allowance upon which the auditor draws his warrant upon the treasurer. This is the usual mode, and the statute does not change it. If, then, the amount of the appellee's compensation as such officer was determined by the board of health, and the allowance was made for the sum thus fixed, the board of commissioners did have authority to make the allowance. The contrary does not appear, and as this court will indulge every reasonable presumption in favor of the ruling of the circuit court, it will indulge the presumption that the board of health had determined the amount of such compensation, and that the allowance was made by the board of commissioners in payment of the same. *Kissell v. Anderson*, 73 Ind. 485; *Coulter v. Coulter*, 81 Ind. 542; *Peck v. Board, etc.*, 87 Ind. 221.

This much has been said upon the assumption that the county commissioners must determine the amount of such compensation while acting strictly as the board of health. This, however, is probably not required. The commissioners constitute the county board of health, and it would seem that an allowance by them to the secretary of such board was of itself a determination of the amount of such compensation within the meaning of the statute, and that such determination need not precede the allowance nor be made by them while formally acting as the county board of health. A substantial compliance is all that is required.

The statute creating boards of health makes no provision for an appeal, and we think, by implication, denies an appeal from an order awarding the "health officer" compensation for his services. The amount of compensation is a mere matter of discretion with the board of health, and from a decision made in matters of discretion no appeal lies. *Sims v.*

 Alleman v. Wheeler.

Board, etc., 39 Ind. 40; *Moffitt v. State, ex rel.*, 40 Ind. 217; *Grusenmeyer v. City of Logansport*, 76 Ind. 549.

An appeal can not be taken without depriving the board of health of the right to determine the amount of compensation to which its secretary is entitled, and, therefore, the statute, by investing the board with such right, impliedly denies an appeal. The appeal in this case was, therefore, properly dismissed. This conclusion is in entire harmony with the doctrine, that an appeal lies in all cases where it is not expressly or impliedly withheld, as was decided in *Grusenmeyer v. City of Logansport*, *supra*, and the cases following it.

This conclusion renders it unnecessary to notice the assignment that the claim filed does not state facts sufficient to constitute a cause of action.

The order of the court in dismissing the appeal should, therefore, be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed April 2, 1885.

 No. 11,010.

ALLEMAN v. WHEELER.

101	141
188	340

PLEADING.—*Complaint.*—*Demurrer.*—*Motion to Make Certain.*—*Practice.*—

Where the facts alleged in a complaint constitute a substantially good cause of action against the defendant, it is sufficient on demurrer and on motion to make more certain, although it might, with propriety, have been ordered to be made more certain.

PROMISSORY NOTE.—*Endorsement.*—*Warranty of Title and Genuineness.*—

Estoppel.—One who transfers a negotiable instrument by endorsement, warrants the title and genuineness of the paper, and, when sued upon his contract of endorsement, he is estopped from denying the existence, legality or validity of the contract which he transfers, for the purpose of defeating his own liability thereon.

SAME.—*Alteration.*—*Principal and Surety.*—*Sufficiency of Evidence.*—A. W. and E. W. were private bankers, and as such loaned to D. certain

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money for which he executed his note to E. W., cashier, with K. and A. and another as sureties. At its maturity the note was renewed with K. and A. only as sureties. When it was about due again, D. procured A. W. to prepare a new note in further renewal, payable to the latter. D. and K. signed this note, and D. then returned it to A. W., at his bank, and told A. he would find it there awaiting his signature. A. went to the bank, but told A. W. that he was unwilling to longer continue as co-surety with K., but was willing to endorse the note as surety for both D. and K. A. W. thereupon explained how that could be done, and acting under the impression that A. wished and was authorized to have the change made, drew his pen across the name "A. W." and wrote A.'s above it, and the latter then wrote his name across the back. When the note became due E. W. brought suit thereon against D. and K., who denied the execution of the note and succeeded in their defence. In a subsequent action by A. W. against A. on his endorsement, there was a finding and judgment against the latter.

Held, that upon the above evidence the finding will not be disturbed.

From the Marshall Circuit Court.

J. D. McLaren and *H. Corbin*, for appellant.

A. C. Capron and *M. A. O. Packard*, for appellee.

NIBLACK, J.—Action by Amzi L. Wheeler against Philip S. Alleman upon the latter's endorsement of a promissory note, as follows:

"\$1,000. PLYMOUTH, INDIANA, January 23d, 1879.

"One day after date, for value received, we, or either of us, promise to pay P. S. Alleman, or order, one thousand dollars, at his office in Plymouth, Ind., with interest at the rate of ten per cent. after maturity, and with ten per cent. attorney's fees, without any relief from valuation and appraisement laws.

W. W. DUFF.

"REUBEN KALEY."

Endorsed: "P. S. ALLEMAN."

The complaint averred that when the note became due the plaintiff brought suit upon it in the Marshall Circuit Court against Duff and Kaley, as the alleged makers thereof, who joined issue in said cause by a plea of "*non est factum*," and and that upon the final trial, at the March term, 1882, of said

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court, Duff and Kaley recovered judgment against the plaintiff upon such plea and for costs of suit, taxed at \$50.

The complaint further averred that at the time Alleman endorsed the note to the plaintiff, he had knowledge of the fact that Duff and Kaley were not its makers, and were not liable to pay the same; also, that the note remained wholly unpaid.

Alleman, the defendant, first moved that the plaintiff should be required to make the allegations of his complaint more specific, but his motion was overruled. He then demurred to the complaint, and his demurrer was overruled. He thereupon answered in two paragraphs: *First*. Denying the execution of the note by Duff and Kaley and of the endorsement sued on. *Second*. A general denial.

The circuit court trying the cause made a general finding for the plaintiff, assessing his damages at the amount due upon the note, and, denying a new trial, rendered judgment upon the finding.

It is claimed that the circuit court erred: *First*. In denying the motion to require the complaint to be made more specific. *Second*. In overruling the demurrer to the complaint. *Third*. In refusing to grant a new trial upon the ground that the finding was not sustained by sufficient evidence, and was, in fact, contrary to law.

It is enacted by section 376 of the code of 1881, that "In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties; but when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment."

It is quite evident that the facts relied on for a recovery in this action were not as directly and certainly charged as the rules of good pleading required, and that the complaint might, with great propriety, have been ordered to be made more

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definite and certain; but we think the fair inference, from the facts as charged, was, that although Duff and Kaley purported to be the makers of the note, made a part of the complaint, they were not in fact such makers, and that by reason thereof payment could not be enforced against them; also, that at the time Alleman, the appellant, endorsed the note he had knowledge that Duff and Kaley were not its makers, and were not liable to pay it.

As thus construed, the facts contained in the complaint constituted a substantially good cause of action against the appellant. No injustice was, therefore, done him by denying his motion to have that pleading made more definite and certain. For the same reason there was no error in overruling the demurrer to the complaint.

Wait on Actions and Defences, vol. 1, p. 599, says: "An indorser impliedly warrants that the instrument is not forged, and he is liable on this warranty in case the instrument proves to be a forgery. *Herrick v. Whitney*, 15 Johns. 240; *Shaver v. Ehle*, 16 Johns. 201; *Morrison v. Currie*, 4 Duer, 79. The indorsement of a promissory note imports a guaranty by the indorser, that the makers are competent to contract in the character in which, by the terms of the paper, they purport to contract; and, therefore, where a note was void because it was made by married women, the endorser of the note was held liable. *Erwin v. Downs*, 15 N. Y. (1 Smith) 575. Knowledge by the plaintiff, at the time he received the note, that the makers were married women does not affect his right to recover. See *Remsen v. Graves*, 41 N. Y. (2 Hand) 471; *Putnam v. Schuyler*, 4 Hun, 166; 6 S. C. (T. & C.) 485; *Dalrymple v. Hillenbrand*, 2 Hun, 488; 5 S. C. (T. & C.) 57; 62 N. Y. (17 Sick.) 5; *McLaughlin v. McGovern*, 34 Barb. 208."

Edwards on Bills and Notes, at section 274, states the rule to be that "One who transfers a negotiable instrument by indorsement warrants the title and genuineness of the paper he transfers, and when prosecuted upon his contract of indorsement he is estopped from denying the existence, legality or

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validity of the contract which he transfers for the purpose of defeating his own liability thereon. He warrants that the instrument is not forged, and is liable upon that warranty if any of the names prior to his own be not genuine."

In section 1354 of Daniel on Negotiable Instruments, it is said that the relation of one party to a bill or note is often such that he can not deny the genuineness of another's signature, for having treated it himself as genuine, it would be a fraud to permit him to assert the contrary. For instance, having issued a note as genuine in all respects, it would be unjust and fraudulent upon others to permit him to deny its validity, and proof of his having so issued it would be sufficient to entitle the holder to recover against him. See, also, *McKnight v. Wheeler*, 6 Hill, 492; *Edwards v. Dick*, 4 Barn. & Ald. 212.

Where a note is invalid, suit may be brought immediately against the endorser without having sued the makers. *Tam v. Shaw*, 10 Ind. 469; *Davis v. Doherty*, 69 Ind. 11; *Huston v. First Nat'l Bank of Centerville*, 85 Ind. 21.

There was evidence tending to show that for some time previous to 1879 the appellee, with his son Edward R. Wheeler, was a private banker in the city of Plymouth, and that during the year of 1879 their banking house was still kept open for the transaction of some business; that on the 25th day of October, 1877, Duff obtained from the appellee a loan of \$1,000, for which he executed his note to Edward R. Wheeler, cashier, payable in ninety days, with J. R. Duff, Reuben Kaley and the appellant as his sureties; that the proceeds of the loan thus obtained were turned over to the appellant in payment of a debt which Duff owed to him; that on the 26th day of January, 1878, Duff executed another note for the same amount in renewal of the first, payable in one year, with Kaley and the appellant only as his sureties; that in January, 1879, when this last named note was about to become due, Duff went to the appellee and procured the latter

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to prepare a new note to be executed in further renewal of the first note, which new note was the original draft of the note herein above set out, but contained the name of "A. L. Wheeler" as the payee; that Duff signed this new note and took it to Kaley, who also signed it; that Duff returned the note thus signed to the appellee; that Duff soon afterwards met the appellant on the street and told him that the new note was at the appellee's bank awaiting his signature; that the appellant, telling Duff that he wished to have some private talk with the appellee, went into the bank where he found the appellee alone; that the appellant there told the appellee that he had been consulting about the matter and was unwilling to longer continue as co-surety with Kaley, and had hence made up his mind not to sign the new note on its face; that he was willing to endorse it as the surety of both Duff and Kaley, but not otherwise; that the appellee explained to him that to arrange matters in that way he, the appellant, ought to be made the payee of the note, and indicated to him how the proposed new note could be changed so as to make him the payee; that the appellee thereupon, in the presence of the appellant, and acting seemingly under the impression that the latter wished, and was authorized, to have the change made, drew his pen across the name of "A. L. Wheeler" and wrote above it "P. S. Alleman;" that the appellant then wrote his name across the back of the note and left it with the appellee; that after the note became due suit was brought upon it in the name of Edward R. Wheeler; that the makers denied the execution of the note and succeeded in their defence.

The evidence was conflicting as to what occurred, and as to what was said, between the appellant and the appellee at the time the name of the payee of the note was changed, but there was evidence inferentially tending to describe the transaction as we have stated it.

Applying the doctrine of the authorities cited to the facts as herein set forth, there appears to us to have been, and cer-

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tainly was, evidence tending to sustain the finding of the circuit court in all essential respects. The finding was, therefore, presumably not contrary to law, and can not be disturbed upon the evidence.

The record of the action between Edward R. Wheeler and Duff and Kaley was read in evidence, and much time has been consumed in the discussion of the question as to what facts that record established, but in our view there was evidence sufficient to make out a case for the appellee without the introduction of that record, and hence we need not now consider any of the questions made upon it in argument.

The judgment is affirmed, with costs.

Filed March 31, 1885.

No. 11,117.

BINFORD, GUARDIAN, v. MINER ET AL.

PRACTICE.—*Presumption as to Action of Trial Court.*—All presumptions are in favor of the action of the trial court, and an error, in order to reverse a judgment, must affirmatively appear in the record.

EVIDENCE.—*Guardian and Ward.*—Upon the trial of an action brought by a guardian to recover an amount found due his ward upon a settlement made with the defendant at a certain date, and as to which an issue has been made, it is error to reject proof of such settlement and the matters which entered into it.

From the Hancock Circuit Court.

J. A. New, J. W. Jones and J. H. Binford, for appellant.

C. G. Offutt and W. R. Hough, for appellees.

FRANKLIN, C.—Appellant sued appellee Thomas H. Miner on a settlement made March 4th, 1879, for a balance then found due his ward of \$5,499.72, and to foreclose a deed as a mortgage executed to secure the payment of the same against him and his wife. The wife made no defence. The husband filed an answer in eight paragraphs:

1st. A general denial.

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2d. Usury in part, want of consideration as to the usurious part, and payment as to the balance.

3d. Mistake in the settlement.

4th. Substantially the same as the second.

5th. No consideration.

6th. Payment.

7th. Set-off.

8th. Usury in part and payment as to balance.

A demurrer was sustained to the second, third and fourth paragraphs, and overruled as to the fifth, sixth, seventh and eighth.

A reply was filed in four paragraphs:

1st. A general denial.

2d. Settlement of all items in set-off prior to March 4th, 1879.

3d. All items since March 4th, 1879, were paid and received as rents on the deeded premises.

4th. If there was any usury, it was voluntarily paid.

A demurrer was overruled to each paragraph of the reply.

Accompanying the deed there was at the same time executed by appellant's ward a defeasance or agreement, upon the payment of \$5,499.72 within two years, to reconvey the lands to appellee Thomas. The deed and agreement were both, as exhibits, made a part of the complaint.

There was a trial by the court, and upon request a special finding was made and conclusions of law stated. Over a motion for a new trial, judgment was rendered in favor of the plaintiff for \$3,872.84. When, after the rendition of the judgment, it appears by the record that the plaintiff then moved to have entered of record his exceptions to the findings and conclusions of law. There is also in the record a bill of exceptions showing that appellant at some time, but when is not stated, made a motion to make the special findings more specific, also moved the court to make additional findings, and to enter of record additional findings made by the court, all of which motions were overruled.

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The errors assigned in this court are :

1st. Overruling demurrer to fifth, sixth, seventh and eighth paragraphs of answer.

2d. Overruling objections to special findings.

3d. Overruling motion for a new trial.

4th. Error in conclusions of law.

5th. Overruling motion to make special findings more specific.

6th. Overruling motion to make special findings as to rents.

7th. Overruling motion to enter of record other findings by the court.

We see no error in the rulings upon the demurrer to the various paragraphs of the answer.

The second specification, overruling objections to special findings, presents no question for consideration.

The fourth, fifth, sixth and seventh specifications, based upon exceptions to the conclusions of law, and motions in relation to the findings, are not shown by the record to have been made at the proper time ; they may have each been overruled for that reason. All presumptions are in favor of the action of the court, and in order to reverse a judgment the error must affirmatively appear in the record, which, as to these specifications, we do not see so appearing in this record.

The motion for a new trial states nineteen reasons, and we do not think it necessary to refer to them all.

The fifth and sixth reasons stated for a new trial are, that the court refused to permit the plaintiff to prove by a witness upon the stand, at the time of the trial, the settlement between the parties said to have been made on the 4th of March, 1879, or what entered into said settlement. We do not see upon what principle this ruling can be sustained. The settlement was the basis of the cause of action. The general denial in the answer formed an issue upon the settlement, and it was necessary for the plaintiff to prove the settlement before he could maintain his action. We can not say that this ruling did the plaintiff no harm. It is insisted by appellees

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that as the court allowed the plaintiff, as is shown by the special findings, the full amount of his claim on the settlement, he could not have been injured by the ruling. This is only considering what the court allowed on one side. By again referring to the special findings, it will be seen that the court allowed the defendant on his set-off the sum of \$2,537.62. And the special findings also show that a part of this allowance to defendants was upon items occurring prior to the date of said settlement, thereby reducing plaintiff's claim to that extent, and it is by no means certain that plaintiff was not injured by being prevented from proving the settlement, and what was embraced in it.

As the judgment must be reversed for this erroneous ruling, and the other reasons stated for a new trial may not again arise in a subsequent trial, it is unnecessary to discuss and decide them. The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded, with instructions to the court below to grant a new trial, and for further proceedings.

Filed Jan. 9, 1885; petition for a rehearing overruled June 13, 1885.

No. 11,452.**MCWHINNEY v. THE CITY OF INDIANAPOLIS.**

TAXES.—*Invalid Sales by Cities.*—*Remedy.*—Sections 227 and 228 of the act of December 21st, 1872, providing a remedy for purchasers of real estate at invalid tax sales, and which were applicable to sales of real estate made by cities, were re-enacted and continued in force as sections 217 and 218 of the act of March 29th, 1881, which are likewise applicable to cities, and such remedy has been continuously in force since the date of the first act, notwithstanding its repeal and re-adoption.

SAME.—*Lands Illegally Annexed, Sale of.*—*Remedy of Purchaser.*—The common council of a city by resolution annexed certain real estate to the city,

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and assessed the same for taxes for the years 1878 and 1879, and such taxes remaining unpaid said real estate was, on February 15th, 1881, sold to M., and a certificate issued to him. Before a deed was executed the city annulled the annexation, because the land was not contiguous. M. had no knowledge at the time of his purchase that the land was not properly annexed and legally assessed, and before he discovered said facts he paid taxes thereon in addition to the purchase-money.

Held, that M. can recover from the city, under sections 217 and 218 of the act of March 29th, 1881, the amount of the purchase-money and subsequent taxes paid.

From the Marion Superior Court.

J. T. Lecklider, for appellant.

C. S. Denny, for appellee.

BEST, C.—This action was brought by the appellant to recover from the city of Indianapolis the amount of purchase-money paid by him at an invalid sale of certain real estate sold for city taxes.

The complaint averred, in substance, that the common council of the city, by resolution, annexed certain real estate to the city and assessed the same for taxes for the years 1878 and 1879; that said taxes remaining unpaid, the city, on the 15th day of February, 1881, sold said real estate to the appellant for \$600, and issued to him a certificate of purchase; that thereafter, and before a deed was executed, said city declared by a resolution of its common council, that said realty had not been legally annexed, because the same was not contiguous to the limits of the city; that at the time of the purchase and the payment of the purchase-money, the appellant had no knowledge that said realty was not properly annexed nor legally assessed by said city; that said realty was not in fact contiguous to said city, nor liable to be assessed for city purposes; that before he discovered such facts he paid about \$75 taxes thereon, and as soon as he learned such facts he demanded the repayment of his money, which was refused, etc. Wherefore, etc.

A demurrer to the complaint, for the want of facts, was sustained, and this ruling is assigned as error.

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The general rule is well established that a purchaser at a tax sale, in the absence of a statute, assumes all risk, and if he fails to acquire a lien or the title by his purchase, he is without remedy. *City of Logansport v. Humphrey*, 84 Ind. 467, and authorities cited.

The mere payment of the purchase-money, and the failure to acquire the title or a lien, do not, therefore, entitle the appellant, under the rules of the common law, to recover back his money.

This the appellant concedes, but insists that the statutes in force now and at the time of his purchase furnish him the proper remedy.

At the time this purchase was made the act of December 21st, 1872, was in force. Section 227 of that act provides that "Whenever the county auditor shall discover, prior to the conveyance of any land sold for taxes, that the sale was, for any cause whatever, invalid, he shall not convey such lands; but the purchase-money and interest thereon, shall be refunded out of the county treasury to the purchaser, his representatives or assigns, on the order of the county auditor; and such land, if originally liable to taxation, and being still delinquent, shall be again placed on the delinquent list, and the amount so refunded, with interest, be collected as in other cases."

Section 228 provides that "No sale or conveyance of land for taxes shall be valid, if at the time of being listed such land shall not have been liable to taxation."

These sections were applicable to the sale of lands made by a city, and if they were yet in force no doubt could be entertained about the right of appellant to recover back his money by virtue of them. This the appellee concedes, but insists that since the act of December 21st, 1872, was repealed by the act of March 29th, 1881, the remedy furnished by these provisions is forever gone. This conclusion is based upon the assumption that the act of March 29th, 1881, did not contain similar provisions. In this the appellee is mistaken, as the last named act literally re-enacted section 227 of

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the act of December 21st, 1872, and also re-enacted section 228 of said act so far as the same is above set out. These sections in the act of March 29th, 1881, are sections 217 and 218, and section 259 of said act makes the entire act applicable to cities, as the act of December 21st, 1872, had theretofore been. It will thus be seen that the remedy which the appellant invokes has existed continuously since the act of December 21st, 1872, went into force, unless the repeal of these sections by the very act which re-adopted them breaks the continuity. That it does not in such sense as to affect the appellant's right to such remedy is clear upon principle and upon authority. The re-enactment of these sections evinces an intention upon the part of the Legislature to continue in force uninterruptedly this remedy, and it must be deemed to have been in force since its enactment, notwithstanding its repeal and re-adoption. It can not be that the Legislature intended by this act to extend this remedy to all subsequent purchasers and to deny it to all prior ones, and the act should not thus be construed. *Fullerton v. Spring*, 3 Wis. 588; *Wright v. Oakley*, 5 Met. 400; *Gorley v. Sewell*, 77 Ind. 316.

Again, if this remedy is not a continuing one, the new is a mere substitute for the old, and the appellant, though his purchase was made before its adoption, is entitled to the benefit of such remedy. *Flinn v. Parsons*, 60 Ind. 573; *Crecelius v. Mann*, 84 Ind. 147.

As the land assessed in this case was not liable to taxation, the appellant could not, by his purchase, acquire the title or a lien, and was, therefore, entitled to avail himself of this statutory remedy. We, therefore, conclude that the appellant, upon the facts stated, is entitled to recover from the appellee the purchase-money and the interest thereon.

This conclusion is not in conflict with the case of *City of Logansport v. Humphrey*, *supra*. It was there held that the purchaser of personal property for city taxes, on failure of title, could not recover back his money, as there was no statute authorizing such recovery, and in the absence of such

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statute the rule of *caveat emptor* applies. This is in strict harmony with the conclusion here reached. There was in such case no statute and no remedy, and hence there could be no recovery.

For the reasons given, we are of opinion that the court erred in sustaining the demurrer to the complaint, and for such error the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be reversed, at the appellee's costs, with instructions to overrule the demurrer to the complaint.

Filed March 14, 1885; petition for a rehearing overruled May 25, 1885.

No. 11,482.

CRIM ET AL. v. FLEMING.

PRINCIPAL AND SURETY.—*Release by Surrender of Collateral Securities.*—

Where a creditor has notice of the relation of principal and surety, he holds collateral securities in trust for the benefit of the surety, and the release of such securities releases the surety to the extent of the whole value thereof.

SAME.—*Assignment of Fees Due Debtor.*—*Surrender.*—Where a creditor receives an assignment of fees due the debtor as a public officer, and agrees to collect them and apply the proceeds to the payment of his claim, and, without the consent of the surety, he allows the debtor to collect and appropriate the proceeds, the surety is proportionally released.

SAME.—*Diligence of Creditor.*—Upon a failure of the creditor to use reasonable diligence to make collateral securities available, he is responsible to the surety for consequent loss, and without notice from the surety. And this does not violate the rule that mere passive negligence will not release the surety from obligation to pay on default.

SAME.—*Indemnifying a Surety.*—Where a principal pays to the surety sufficient money to indemnify him, the surety holds the money for the benefit of the creditor, to whom he occupies the position of a debtor.

From the Hamilton Circuit Court.

J. W. Sansberry, M. A. Chipman and J. W. Sansberry, Jr.,
for appellants.

E. P. Schlater, C. L. Henry and H. C. Ryan, for appellee.

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ELLIOTT, J.—The material averments of the first paragraph of the appellee's complaint may be thus summarized: On the 13th day of March, 1877, William Crim obtained judgment against Thomas J. Fleming as principal and the appellee as surety for \$1,389.79. The principal debtor was the clerk of the county of Madison from October, 1870, to the 15th day of October, 1874, and there was due him as fees on the 12th day of April, 1878, \$4,000. On that day these fees were by him assigned to Crim by the following written instrument: "For value received I hereby assign to William Crim, of Anderson, Indiana, all unpaid fees due me as the clerk of the Madison Circuit Court, as the same are taxed and charged upon the fee-records of said court, hereby authorizing said William Crim to receive and receipt for said fees as the same may be paid." This instrument was entered of record in the order-book of the Madison Circuit Court on the day it was executed. At the time the assignment was made the uncollected fees due Thomas J. Fleming were of the value of more than \$2,000. The assignment was made as a security for the judgment on which the appellee was surety, and was accepted by the appellant as additional security for its payment. In 1880 the appellant assigned back to Thomas J. Fleming all the fees, and did it without the knowledge of the appellee.

The second paragraph differs from the first in this, that it does not aver that the fees were assigned back to Thomas J. Fleming. It does, however, aver that Crim received of the fees the sum of \$471.53, and that he suffered Thomas J. Fleming to collect the fees to the amount of \$500, and that Crim neglected to collect the remainder of the fees, and suffered those owing them to become insolvent. It is also averred that "The said assignment was made for a security on said judgment, and to be held and collected by said William Crim and paid on said judgment, and William Crim accepted the assignment of said fees as security on said judgment, and to

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collect and pay the same thereon." The insolvency of the assignor and principal debtor is also averred.

The release of securities held by the creditor releases the surety to the extent of the value of the securities released. The first paragraph of the complaint is good, for the reason that it shows the release of securities exceeding in value the amount of the debt due the creditor.

The second paragraph of the complaint is good, for the reason that it shows that the creditor undertook to collect the fees assigned to him, and that he negligently failed to do so. The complaint shows more than mere passiveness on the part of the creditor, for it shows that he permitted the principal debtor to collect the fees and appropriate them to his own use. It is quite clear that a creditor who receives from the principal debtor securities which he undertakes to collect and apply on the debt is guilty of positive negligence if he surrenders them to the principal debtor, and permits him to collect and appropriate the proceeds. Equity will not suffer the rights of the surety to be thus frittered away. There was here an express agreement to collect and apply the money to the payment of the debt, and it was a violation of this agreement to permit the principal debtor to regain possession of the securities and use them for his own benefit. The case falls within the rule, that "The surety is discharged where collateral securities held by the creditor from the principal debtor are voluntarily returned without the consent of the surety, at least to the value of such collateral securities." *Colebrooke Collateral Securities*, 311, section 240.

The second paragraph of the answer alleges that the assignment was ineffective, because not entered on or attached to the judgment-docket or fee-book. This theory can not be sustained. The assignment was an equitable one, and operated to vest in the assignee the equitable title, and this is sufficient. *Burson v. Blair*, 12 Ind. 371; *Scobey v. Finton*, 39 Ind. 275; *Cravens v. Duncan*, 55 Ind. 347; *Adams v. Lee*, 82 Ind. 587. The question here is, not as to the rights of the

debtor, but as to the rights of the surety, and section 604 of the statute has no application whatever.

The complaint avers, and the answer admits, because the averment is not denied, that the fees were due the appellee's principal, and no question is presented as to his right to assign them.

The fourth paragraph of the answer purports to answer so much of the second paragraph of the complaint as seeks to recover for the fees and costs collected by Thomas J. Fleming, and it is alleged that the assignment was not entered on the judgment docket nor attached thereto; that the persons owing the fees paid them to Thomas J. Fleming without the knowledge of the appellant. We regard this paragraph as clearly bad. As the appellant had accepted the assignment and agreed to collect the fees, he was bound to take such steps as were reasonably necessary to make the assignment effective. "A creditor holding collateral securities is chargeable with a trust concerning the same for the benefit of the surety, where he has notice of the existence of such relation as between the parties to the note." *Colebrooke Collateral Securities*, section 239. When we add, as must be done in this case, to the duty created by law the duty created by the express agreement of the creditor to collect the collateral security assigned him, it seems clear that his failure to use reasonable diligence to make the security available should operate to release the surety. The effect of such an agreement, when combined with the general duty imposed by law, is to assure the surety that the creditor will do what is reasonably necessary to make the security effective, and that if there is a violation of the duty created by contract and by law, and consequent loss, the surety is discharged. The surety has a right to rely upon the creditor's agreement, and to permit the latter to disregard it, would operate to ensnare and mislead the former. We do not believe that a surety is bound to notify the creditor to keep his engagement, but do believe that the creditor must perform it without notice. We can perceive

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no reason for discriminating such an agreement from any other, and we know of no principle that denies one contracting party compensation for a breach of a contract, because the other party was not prodded into performing it by notice. There is a stubborn conflict in the authorities as to the soundness of the doctrine, adopted in *Philbrooks v. McEwen*, 29 Ind. 347, that a creditor who accepts a mortgage as a collateral security does not release a surety by an omission to record it within the time required by law. Brandt Suretyship & Guaranty, sections 384, 385, 386, 387; Colebrooke Collateral Securities, section 241. But the case in hand is not within that rule, for here there was an express agreement to collect, and this makes an essential difference, for a breach of an agreement can not be justly regarded as inaction or passive neglect. In stating the rule declared by the authorities which support the doctrine of *Philbrooks v. McEwen*, *supra*, the author last referred to uses this language: "In the absence of an express agreement to use diligence, or of such special circumstances as to render prompt action of the creditor an absolute duty, the mere inaction or passive delay, or omission of the creditor to enforce the collection of collateral securities held by him from the principal debtor, is not sufficient of itself to discharge or release a surety from his obligation to pay the debt upon default." Colebrooke Collateral Securities, section 241. It is evident from this statement that the fact that there was an express agreement to collect the securities assigned by the creditor takes the case out of the general rule, for it adds a new element of controlling importance.

The seventh paragraph of the answer avers that Thomas J. Fleming fully paid to the plaintiff the whole of the judgment, principal, interest and costs, before the commencement of the suit. In our opinion this answer is good. If the surety had been paid the full amount for which he was liable, he could not be injured by any wrong or omission of the creditor. The money received by him from his principal indem-

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nified him, and no matter what the creditor did with the collateral securities, he could lose nothing. The money received was his only as an indemnity, and if he should be compelled to use it in paying the creditor, he would lose nothing. Where a surety is indemnified by the principal, he is not released by any indulgence granted by the creditor, nor by any negligence on his part in regard to the collection of the collateral securities assigned to him by the principal debtor. Story Eq. Juris. (10th ed.), section 502 *b*. The authorities upon this subject go very far, for it is said: "A surety who is fully indemnified is not discharged by the release of the principal. In such case the surety himself occupies the position of a principal." Brandt Suretyship & Guaranty, section 123. Payment to the surety by the principal is the most ample indemnity that could well be made, for, with the money in his hands, the surety is absolutely safe from loss, and no act that the creditor can do can injure him.

If, as the answer avers and the demurrer admits, the money was paid by the principal to the surety on the judgment, the only just claim that the latter can have to it is that which accrues to him in his character of surety, and in equity he really holds the money for the benefit of the creditor, to whom he occupies the position of a debtor. It is logically inconceivable that any acts of the creditor could cause him injury, for no additional burden or risk can be imposed on him while he has the money to pay the debt in his own hands.

It is too plain to be fairly debatable that the defence pleaded is not admissible under the general denial.

Judgment reversed.

Filed March 19, 1885.

No. 11,501.

HIGHAM v. VANOSDOL.

HUSBAND AND WIFE.—*Enticing Wife Away.*—*Adultery.*—*Damages.*—*Evidence.*—*Privileged Communications.*—In an action by a husband to recover damages for enticing away, debauching, and alienating the affections of his wife, the fact as to whether adultery had been committed by the defendant and the plaintiff's wife can neither be proved nor disproved by any communications had between the plaintiff and his wife after her return.

SAME.—*Declarations of Wife.*—*Res Gestæ.*—*Mitigation of Damages.*—In such case, declarations made by the wife to a third person, on the day she eloped with the defendant, or within the time when she was presumably under his influence, as to the causes of her leaving, which are not part of the *res gestæ* accompanying the act of leaving, and which do not impute to her husband any violence or cruel treatment, are not admissible in mitigation of damages.

SAME.—*Sufficiency of Cause of Action.*—Where a stranger, knowing a woman to be the wife of another, and having no reason to suspect mistreatment of her by her husband, entices, persuades and takes her away to another State and keeps her in different places for ten days, all without the consent of her husband, such husband can maintain an action for damages without proof of adultery.

SAME.—*Wife's Consent.*—In such case, it is no defence that the wife consented, or that the defendant did not otherwise persuade or entice her away, except to furnish the means and opportunity for the elopement, where he carries and keeps her away until at his pleasure she is returned, as the wife has no power to consent.

PRACTICE.—*Witness.*—*Cross-Examination.*—A question to a witness on cross-examination, which seeks to elicit testimony regarding a matter not in any way referred to in the direct examination, is improper.

SAME.—*Exclusion of Testimony.*—*How Question Reserved.*—The exclusion of testimony can only be made available by asking some pertinent question of a witness on the stand, and, if objection is made, stating to the court what testimony the witness would give in answer thereto.

From the Switzerland Circuit Court.

J. A. Works, L. O. Schroeder and W. R. Johnson, for appellant.
A. C. Downey, for appellee.

MITCHELL, J.—Benjamin F. Vanosdol brought his complaint in the court below against Thomas Higham, alleging therein that the defendant, on the 17th day of September,

101	160
124	513
101	160
138	596
101	160
142	319
101	160
147	119
101	160
153	608
101	160
154	636
101	160
165	560

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1882, well knowing that Clara Vanosdol was the plaintiff's wife, unlawfully persuaded, procured and enticed her to leave his home and society, and after carrying her away, with intent to injure the plaintiff, wrongfully debauched and had carnal knowledge of her, without plaintiff's consent, and that by the means above mentioned he had alienated her affections from plaintiff and deprived him of her society, etc., to his damage, etc.

The questions in the record relate to rulings of the court in excluding certain communications had between the husband and wife, and certain declarations made by the wife to others, and in giving and refusing certain instructions to the jury.

The evidence showed that Vanosdol and his wife were married on the 26th day of March, 1882, he being twenty-two and she seventeen years of age at the time. They lived together, so far as appears, amicably until the 17th day of September of the same year, when, without any previous intimation of dissatisfaction with her husband, she clandestinely eloped with the defendant, Higham, an unmarried man, about forty years old. The evidence tends to show that after a number of secret interviews had with the wife, Higham took her in his buggy in the evening, in the absence and without the knowledge of her husband, and drove rapidly with her to the Ohio river, where, procuring an acquaintance to row them over, they crossed the river into Kentucky where they remained in various places, Newport and Louisville among the rest, for about ten days when they returned to Indiana. While the circumstances shown in evidence were almost irresistible, there was no direct proof of adultery, or that they occupied the same room with each other at night during their absence. The plaintiff and his wife never lived together afterwards. The trial resulted in a verdict and judgment for the plaintiff for \$3,250.

At the trial the plaintiff was a witness in his own behalf,

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and on cross-examination he was asked whether or not at the time he met his wife after her return from the trip taken with the defendant, she did not say to the plaintiff, "If you will go with me and my father we will take you to all the places where Mr. Higham and I stopped, and I will prove to you that I have been guilty of nothing except going away with Mr. Higham," and whether he did not say in reply to her: "I have full confidence in you; I believe what you say."

Objection was sustained to this question, and it is now insisted by counsel that it was competent evidence for the purpose of showing that the plaintiff did not then believe his wife guilty of adultery.

The evidence was properly excluded on two grounds:

1. Whatever conversation was had on the occasion referred to between the plaintiff and his wife constituted such communication between husband and wife as fell directly within the terms of the last clause of section 497, R. S. 1881. The wife could not have testified if she had been called as a witness in the defendant's behalf, to any communication made by her to her husband, or by him to her, on the occasion referred to, and it is clear that the husband, for the same reason, could not be compelled to give in evidence in the defendant's favor the conversation imputed to them in the question propounded. Whether the defendant had been guilty of adultery or not with the plaintiff's wife could neither be proved nor disproved by any communication made by the wife to the husband. *Dye v. Davis*, 65 Ind. 474; *Kingen v. State*, 50 Ind. 557.

2. As there was no inquiry made of the plaintiff on his direct examination, and nothing said by him concerning any conversation had with his wife after her return, the testimony objected to was properly excluded, on the additional ground that it was not proper cross-examination.

The next point argued is that the court erred in excluding certain declarations made by the plaintiff's wife to Mrs. Littlefield.

The point is presented in the bill of exceptions in this

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way: "And here the defendant offered to prove in mitigation of damages by the witness, Mrs. Belle Littlefield, that at her house on the day on which she is alleged to have eloped with the defendant, and before she started, she had a conversation with plaintiff's wife, in which she said to this witness: 'My husband does not treat me like he should treat a wife, and I can not and will not return to him; I shall never live with him any more; I have left him for good.'" This was objected to.

It does not appear that any question was asked the witness, and objected to by the plaintiff; nor does it appear what the witness would have testified to, or whether she would have testified to anything concerning the proposition which was made. The exclusion of testimony can only be made available by asking some pertinent question of a witness on the stand, and, if objection is made, stating to the court what testimony the witness would give in answer to the question proposed. *Lewis v. Lewis*, 30 Ind. 257; *Adams v. Cosby*, 48 Ind. 153; *Baltimore, etc., R. R. Co. v. Lansing*, 52 Ind. 229. For the same reason no question is available in respect to the offer made in relation to the other witness, Littlefield.

The testimony was, however, inadmissible, and even if the question had been properly made the ruling of the court was right. Where declarations are made by a wife, in connection with an act done by her, as the exhibition of marks or injuries upon her person, such declarations, if they are explanatory of the manner, or tend to show by whom the injury was inflicted, are received, as in *Gilchrist v. Bale*, 8 Watts, 355; *Berdell v. Berdell*, 80 Ill. 604; *Cattison v. Cattison*, 22 Pa. St. 275; or where the wife seeks safety from the violence of her husband in flight, declarations made at or so near the time of the flight as to be part of the *res gestæ* are also admissible, as in *Aveson v. Lord Kinnaird*, 6 East, 188. But, ordinarily, declarations of the wife which are not part of the *res gestæ*, accompanying the act of leaving, or of the exhibition of injuries to her person, or some other substantive act which is

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explained by the declaration, can not be admitted. In the case before us, none of the declarations fall within the rules above stated.

There is yet another rule in cases of this kind which may sometimes be invoked, to admit declarations of the wife imputing to the husband cruel treatment of her and showing a want of conjugal affection for and discontent with her situation and treatment by the husband. This rule governed the case of *Palmer v. Crook*, 7 Gray, 418. But declarations of this character from a previously chaste wife are always subject to grave suspicion, and are only to be received under the closest scrutiny, and are in no case to be admitted unless it affirmatively appears that they were made before the wife was the subject of intrigue with, or under the influence of, the paramour in whose favor they are sought to be introduced. Wharton Law of Evidence, section 225. The reasons for this rule are so obvious that they need not be stated. *Edwards v. Crook*, 4 Esp. 39.

The evidence offered and excluded falls directly within the inhibition of this rule. Most of the declarations which it was proposed to prove were made on the very day when the plaintiff's wife eloped with the defendant, when all their plans had doubtless been fully contrived, and all of the declarations were within the time when she was presumably under his influence to a greater or less degree.

For aught that appears, the wife was treated with tenderness by the husband, and her attachment for him seems to have been undiminished until after the secret conferences and conversations with the defendant.

It should not be understood that proof of unhappy relations existing between a husband and wife, however such proof may be made, would in any degree palliate or justify the offence of the defendant, nor would it make his conduct less reprehensible. Such a condition, when proved, may show that the injury which the husband sustained was less aggra-

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vated than it otherwise might have been. *Hadley v. Heywood*, 121 Mass. 236; *Coleman v. White*, 43 Ind. 429.

At the request of the plaintiff the court gave the jury the following instruction: "If the evidence satisfies the jury that the plaintiff and Clara Vanosdol were, at and before the time referred to in the complaint, husband and wife, and that the defendant, knowing of such relation, took the said Clara from where she was staying in this county, without the consent of the plaintiff, and carried her to the State of Kentucky, and kept her there at various places for ten days, when he again returned her to the State of Indiana, the jury must find a verdict for the plaintiff without any proof of the commission of adultery with her."

The court, at the request of the defendant, also gave the following instruction, pertinent to the same subject: "If the evidence in the case fails to establish the fact that the defendant and the plaintiff's wife had sexual intercourse together, then it remains for you to determine whether or not the defendant enticed the plaintiff's wife to absent herself from him, and to entitle the plaintiff to recover upon that ground he must have proven by a preponderance of the evidence, that the defendant wrongfully either persuaded, procured or enticed the plaintiff's wife to absent herself from her husband; and unless you find from the evidence that he used some means to entice and persuade plaintiff's wife to leave him, whereby he has been deprived of her society and assistance, your verdict should be for the defendant."

These instructions relate to the same subject, and are not inconsistent with each other, and, taken together, they state the law more favorably to the defendant than he had a right to ask.

Knowing that she was the wife of another, having no reason to suspect any mistreatment of her by her husband, the mere fact of taking her off in the clandestine and aggravating manner disclosed in the evidence, and keeping her away against the consent of her husband, entitled the husband to maintain the action, and it was not necessary for him to show anything

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more than the taking and keeping her away under the equivocal relations shown, without his consent. This was enough to put the burden upon the defendant to give some proper and reasonable explanation for his conduct.

That a state of circumstances might exist where a stranger would be justified in carrying a wife beyond the reach of her husband with her consent, and without his, can not be denied; but such an adventure on the part of a stranger is always attended with the peril of his being able to show to the satisfaction of a court that the safety of the wife, apparently, at least, demanded his intervention, and that what he did was meant in good faith for her protection.

The husband's right of action is complete against any stranger who has lent countenance to the breaking up of his household, and it is no defence for such person to show that the wife consented, or that he did not otherwise persuade or entice her away, except to furnish the means and opportunity for the elopement, he himself carrying and keeping her away until at his pleasure she was returned. The wife had no power to consent. *White v. Murtland*, 71 Ill. 250 (22 Am. R. 200).

The distinction between this case and the case of *Wood v. Mathews*, 47 Iowa, 409, which is relied on by the appellant, is in this, that was a case for debauching the plaintiff's wife, and contained no element of persuading, enticing or procuring her to abandon him. What was said in the complaint in that case concerning the alienation of the wife's affections, etc., was merely by way of aggravation of damages, and so it might well have been, as it was held by the learned court, that an instruction was erroneous which told the jury that the alienation of the wife's affections, without more, was sufficient to make the defendant liable.

What has been said renders it unnecessary that we should examine the other instructions, about which some question is made. The verdict is sustained by the evidence.

The judgment is affirmed, with costs.

Filed March 31, 1885.

Fahlor v. The Board of Commissioners of Wells County *et al*

No. 11,363.

FAHLOR v. THE BOARD OF COMMISSIONERS OF WELLS
COUNTY ET AL.

101	167
182	426
101	167
145	609

GRAVEL ROAD.—*Taxes in Aid of.*—*County Commissioners.*—*Special Session.*—*Injunction.*—An order, made by a board of commissioners at a special session not legally convened, levying a special tax to aid in the construction of a gravel road, is illegal and void, and the collection thereof may be enjoined at the suit of a taxpayer.

SAME.—*Statute Construed.*—The sessions of the board of commissioners, pursuant to section 4441, R. S. 1881, are held for the sole purpose of receiving from the school trustees the reports therein provided for and taking action thereon, and the board has no power to transact any other business.

From the Wells Circuit Court.

N. Burwell, for appellant.

COLERICK, C.—This action was brought by the appellant to enjoin the collection of certain taxes levied upon and assessed against his lands by the appellee, The Board of Commissioners of Wells County, for the construction of a gravel road, and which the appellee John P. Deam, as county treasurer, was demanding, and threatening to collect.

Separate demurrers by the appellees, severally, to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action, were sustained by the court, and the appellant refusing to amend his complaint, final judgment, on demurrer, was rendered against him, from which he has appealed to this court, and assigns as errors that the court below erred in sustaining said demurrers.

The complaint averred, in substance, that the appellant then was, and for more than ten years past had been, the owner of certain real estate therein described; that said board of commissioners had attempted to levy a special tax upon said real estate to aid in the construction of a gravel road designated "The Bluffton and Rockford Gravel Road," and had caused the auditor of said county to enter upon the tax duplicate provided for the purpose, against said real estate, a

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tax of \$218.40, to be paid in five years, in semi-annual instalments; that said duplicate for said tax for the year 1882 was then in the hands of said county treasurer for collection, and that he had demanded payment thereof, and was threatening to collect the same by distress and sale unless they were paid; that said taxes had created a cloud on the appellant's title to said real estate, and that the same had been assessed and entered upon said tax duplicate, under and pursuant to certain proceedings claimed and purporting to have been had before said board of commissioners, and under and in pursuance of its orders entered upon the record of the proceedings of said board, a copy of which was filed with the complaint. It was then averred that the proceedings for the levy and collection of said taxes, including the appointment of the three viewers and engineer to examine, view and lay out said gravel road, and all subsequent proceedings connected therewith, were defective, illegal and void, for the reason that said board of commissioners were not in legal session on the 20th day of October, 1881, when the petition was presented asking and praying for the construction of said gravel road, and when the order was made appointing said viewers and engineer, and fixing a day when they should meet and proceed to examine, view and lay out said gravel road; that the board was not in general session, because the law prescribed another and different time for such general session, and was not legally in special session, because no summons had been issued by the auditor, or any other officer of Wells county, to the sheriff of said county, convening the said board on that day, or any previous day from which the board had adjourned to that day; that no such notice was served on said board, nor on a majority thereof; that said board received the said petition for the construction of said gravel road, and appointed viewers and engineer to examine, view and lay out the same, on Thursday, the 20th day of October, 1881, and then claimed and pretended to be in legal session for the transaction of general business, and for the transaction of this particular business,

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because the law authorized the said board to hold a session on the first Monday after the second Tuesday in October to receive reports from the school trustees of the receipts and expenditures of the school revenue; that besides receiving said reports they had pretended to transact other business, and adjourned from day to day till Thursday, the 20th, as aforesaid; that said pretended session for the transaction of the general business of the county, or for the transaction of any business pertaining to the construction of gravel roads, or of receiving petitions therefor, or for the appointment of viewers and surveyor or engineer to examine, view and lay out the same, was unauthorized by any law then in force, and was absolutely void, and its acts were of no binding force or validity whatever. Wherefore the appellant prayed that said taxes be declared illegal and void, and that the appellees be enjoined from collecting or attempting to collect the same, or any part thereof, and for all other proper relief.

The question presented for our consideration, by the ruling of the court below on the demurrer to the complaint, is, Were the proceedings of the board of commissioners, recited in the complaint, illegal and void? The case of *Columbus, etc., R. W. Co. v. Board, etc.*, 65 Ind. 427, is directly in point and decisive of the question. It was an action to enjoin the collection of a tax levied by the board of commissioners of Grant county, pursuant to an order of the board made at a special session thereof not legally convened, granting the prayer of a petition for an election by the voters of a township upon a proposed appropriation to aid in the construction of a railroad. The complaint, in that case, averred, among other facts, that "the board of commissioners of Grant county were not in legal session on the 15th day of April, 1874, when the petition was presented, asking that Mill township might make an appropriation to aid said Cincinnati, Wabash and Michigan Railroad Company in the construction of its railroad through said township, and when the order was made that the polls be opened for the votes of said township

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on the subject of said appropriation; that the board was not in general session, because the law prescribed another and different time for such general session; that the board was not legally in special session, because no summons had been issued by the auditor or any other officer of Grant county to the sheriff of said county, convening said board on that day, or on any previous day, from which the board had adjourned to that day; that no such notice was served on said board nor on a majority thereof, nor was six days' notice given of said special session, nor was there, in the opinion of the officer calling said board, an emergency requiring a shorter time; and that said pretended special session of said board was unauthorized by any law of this State then in force, and was absolutely void, and its acts were of no binding force or validity whatever."

A demurrer was sustained to the complaint, and final judgment, on demurrer, was rendered against the plaintiff, from which it appealed to this court. It was there said by this court, per HOWE, C. J., in considering the sufficiency, on demurrer, of the averments in the complaint above set forth: "It seems to us that the appellant's complaint in this case stated facts sufficient to show a present cause of action, when the suit was commenced. If the facts stated in the complaint were true, and as they were well pleaded the appellees' demurrers admitted their truth, the taxes levied and assessed by the board of commissioners of Grant county, upon the appellant's property in Mill township, in said county, to aid the Cincinnati, Wabash and Michigan Railroad Company in the construction of its railroad, were clearly illegal, invalid and void. The proceedings, which led to the levy and assessment of the taxes sought to be enjoined, were evidently intended to be had and held under and pursuant to the provisions of the act of May 12th, 1869, authorizing counties and townships to aid in the construction of railroads. It was indispensably necessary, we think, to the legality of those taxes, that the proceedings in question, in their inception and in every ma-

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terial step subsequently taken, should have conformed strictly to the requirements of the statute. If it be true, as alleged in the complaint, that the board of commissioners of Grant county were not in legal session, when the petition was presented for an appropriation by Mill township to aid in the construction of said railroad, and when the order was made for submitting the question of such appropriation to the votes of the legal voters of said township, it is clear that the proceedings of the board were illegal in their inception, and that the levy and assessment of taxes pursuant thereto were illegal, invalid and void." For the error of the court below in sustaining the demurrer to the complaint the judgment was reversed.

It will be observed that the averments of the complaint in the case cited, and in the one under consideration, so far as they related to the invalidity of the orders of the board of commissioners in each case, were substantially alike. Believing, as we do, that the law was properly enunciated in the case cited, and adhering to that decision, as a correct exposition of the law, we must hold, in this case, that the court below erred in sustaining the demurrers to the complaint.

The only difference between the two complaints is, that in the one under consideration it was averred that the board of commissioners asserted the right to make the order in question, because the statute authorizes the board to hold sessions on the first Monday after the second Tuesday in October, to receive reports from the school trustees of the receipts and expenditures of the school revenue, and that said order was made while the board was then in session. By an examination of the statute authorizing the holding of such sessions of the board of commissioners, R. S. 1881, section 4441, it will be seen that such sessions are to be held for the sole purpose of receiving from the school trustees the reports therein mentioned and taking action thereon. The board has no power, at such sessions, to transact any other busi-

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ness, and hence the order in question was, for the reasons above stated, a nullity.

The court erred in sustaining the demurrers to the complaint, and for the error so committed the judgment should be reversed.

PER CURIAM.—The judgment of the court below is reversed at the costs of the appellees, and the cause is remanded with instructions to the court to overrule the demurrers to the complaint, and for further proceedings in accordance with this opinion.

Filed April 2, 1885.

 No. 11,462.

BALLENGER v. DROOK ET AL.

WILL. — *Life-Estate.* — *Remainder.* — *Title.* — *Judgment Lien.* — A will directed that after the termination of a life-estate in the surviving widow, the executor should sell the testator's real estate, and divide the proceeds, one-tenth to each of the testator's ten children. During the life of the widow, a creditor of one of the children recovered judgments against him. After the death of the widow, the administrator with the will annexed sold the real estate under the power in the will.

Held, that on the death of the testator, the title to the land vested at once in the children, subject to the widow's life-estate, and the executor's power of sale under the will, and that the judgments were liens upon the one-tenth interest of the judgment defendant.

Held, also, that the liens followed the fund in the hands of the administrator, and became liens thereon superior to any claim of the judgment defendant or his grantee, subsequent to the judgment.

From the Grant Circuit Court.

J. L. Custer, for appellant.

T. D. Evans, A. Steele and R. T. St. John, for appellees.

ZOLLARS, C. J.—A demurrer having been sustained to appellant's complaint, he appealed, and assigns that ruling as error.

The material averments of the complaint may be summa-

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rized as follows: John Drook died testate in 1870, the owner of real and personal property, and left surviving his wife and ten children. After a provision for the payment of debts and funeral expenses, there is a provision in the will for the disposition of the remainder of the personal estate, and of the real estate, as follows: "The remainder thereof" (personal estate), "if any there be, I give and bequeath unto my wife Saloma, to remain her absolute property if she shall be living at the time of my decease; and if there should be more than she uses, she may give it into the hands of my executors, and they shall dispose of the same at public sale, and divide the proceeds thereof equally among my surviving children, or their heirs, in way and manner hereafter directed. I also direct that my wife Saloma have the full possession and care of my farm whereon I live, during her lifetime. I also direct that my executors shall, after the decease of my wife, sell and dispose of all my property, both real and personal, that may remain, at public sale, * * and divide the proceeds thereof among my ten children in the following manner, * * to wit: *First.* I give to my son Daniel F. Drook one-tenth." A like direction is made as to each child.

In 1879 appellant recovered two judgments against Daniel F. Drook. On the 4th day of December, 1882, Daniel F. Drook sold and executed a deed to James Dill for his one-tenth interest in the real estate. In April, 1883, executions were issued upon appellant's judgments, and in June of the same year they were levied upon the undivided one-tenth interest of the real estate, as the property of Daniel F. Drook. Subsequent to the death of the widow, the administrator with the will annexed sold the land and personal property as directed by the will, and has the proceeds in his hands for distribution. Whether he made these sales before or subsequent to the issuing and levy of the executions, is not shown. The prayer of the complaint is that the one-tenth of the proceeds of these sales may be subjected and applied to the payment of the executions and judgments upon which they were issued,

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in preference to any claims of Daniel F. Drook or his grantee, James Dill.

This same will was involved in the recent case of *Brumfield v. Drook*, *post*, p. 190, and it was decided, following the case of *Simonds v. Harris*, 92 Ind. 505, and previous cases, that upon the death of the testator the title to the land vested at once in the children, subject to the widow's life-estate and the executor's power of sale under the will, and that, therefore, they might convey their interest by deed. Following these cases, it must be held here that appellant's judgments were liens upon Daniel F. Drook's undivided one-tenth interest in the land. As Dill's deed was subsequent to these judgments, he took Drook's interest subject to them. When the land was sold by the administrator with the will annexed, under the power conferred by the will, Dill's title and appellant's judgment liens were at an end, so far as they could affect the land in the hands of the purchaser from the administrator. The judgment liens, however, are transferred to the proceeds of the sale in the hands of the administrator, and as they are prior, and hence superior, to any title that Dill acquired by his deed from Drook, they must be paid out of that fund, as against any claim that Dill or Daniel F. Drook can assert. *Gimbel v. Stolte*, 59 Ind. 446; *Milligan v. Poole*, 35 Ind. 64; *Spray v. Rodman*, 43 Ind. 225; *Wilson v. Rudd*, 19 Ind. 101; *Simonds v. Harris*, *supra*. As to the proceeds from the sale of the real estate, therefore, the complaint makes a case, and the demurrers thereto should have been overruled.

The facts stated in the complaint are not sufficient to entitle appellant to any portion of the proceeds from the sale of the personal property.

For the reasons stated the judgment is reversed, with instructions to the court below to overrule the several demurrers to the complaint, and to proceed in accordance with this opinion.

Filed April 7, 1885.

 Bosworth v. The Wayne Pike Company.

No. 11,874.

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157	112

APPEAL.—*Supreme Court.—Action Originating Before Justice of Peace.—*

Amount in Controversy.—Under section 632, R. S. 1881, no appeal will lie to the Supreme Court from any judgment of a circuit or superior court, in any action originating before a justice of the peace or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars, unless such action is one involving the validity of a town or city ordinance.

From the Jay Circuit Court.

J. R. Perdiaw, O. H. Adair and T. Bosworth, for appellant.*D. T. Taylor, J. M. Smith, J. W. Headington and J. J. M. LaFollette*, for appellee.

Howk, J.—The appellee commenced this suit before a justice of the peace of Jay county, by filing its complaint in thirty-six paragraphs against the appellant, Bosworth. In each of these paragraphs the appellee sought to recover of the appellant the statutory penalty imposed in and by section 3644, R. S. 1881, for the use of its road by him without paying his legal toll, and with intent to defraud the appellee. The trial of the cause before the justice resulted in a finding and judgment for the appellee, from which judgment Bosworth appealed to the circuit court of the county. There the cause was tried by the court, and, at the request of the parties, the court made a special finding of the facts, and thereon stated, as its conclusion of law, that the appellee ought to recover of the appellant ten several penalties, of \$3 each, amounting in the aggregate to the sum of \$30, and rendered judgment accordingly. From this judgment Bosworth has appealed to this court, and has here assigned as error that the trial court erred in its conclusion of law.

The appellee, however, has interposed its written motion to dismiss this appeal, for the following reason: "This cause having been commenced before a justice of the peace, and the amount in controversy, exclusive of interest and costs, being

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only \$30, this court has no jurisdiction to hear, try or determine the cause."

For the reason given appellee's motion must be sustained, and this appeal must be dismissed. Under the provisions of section 632, R. S. 1881, no appeal will lie to the Supreme Court from any judgment of a circuit court or superior court, in any action originating before a justice of the peace or mayor of a city "where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars;" unless such action is one "involving the validity of an ordinance passed by an incorporated town or city." It is manifest from what we have said in relation to appellee's complaint that this action does not involve the validity of any ordinance passed by any incorporated town or city. It originated, as we have seen, before a justice of the peace, and, as the appellee is content with the judgment for \$30 it recovered in the circuit court, it is clear that the amount in controversy, exclusive of interest and costs, does not exceed \$50. It follows that this appeal is not authorized by the statute. *Painter v. Guirl*, 71 Ind. 240; *Wagner v. Kastner*, 79 Ind. 162; *Louisville, etc., R. W. Co. v. Coyle*, 85 Ind. 516; *Winship v. Block*, 96 Ind. 446.

This appeal is dismissed, at appellant's costs.

Filed March 31, 1885.

No. 10,981.

LUDLOW ET AL. v. THE MARION TOWNSHIP GRAVEL ROAD
COMPANY ET AL.

FORMER ADJUDICATION.—Pleading.—Practice.—Uncertainty.—In pleading a former adjudication, it is material to set out with certainty the date on which the judgment was given and the court in which it was rendered; but if the date is left blank, or is otherwise uncertain, the remedy is by motion to make the pleading more specific, and not by demurrer.

SAME.—Identity of Causes of Action.—Where an answer of former adjudication, taking it as a whole and considering its scope, shows that the mat-

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ter in controversy in the former and present actions is the same, it is, in that respect, sufficient on demurrer.

From the Shelby Circuit Court.

T. B. Adams and *L. T. Michener*, for appellants.

O. J. Glessner, *E. K. Adams* and *L. J. Hackney*, for appellees.

MITCHELL, J.—The only question presented in this record relates to the ruling of the court on the second paragraph of the appellants' answer.

The action was brought to enjoin the Marion Township Gravel Road Company from collecting an assessment of benefits which had theretofore been made on the lands of the appellants.

It was alleged that the viewers appointed to make the appraisal did not assess all the lands lying within one and one-half miles of the road, and that the assessment was not made upon an actual view and examination of the lands, but from a map or plat, on which the lands were designated as belonging to the several owners; that they did not enter upon the land and view and inspect it for the purpose of determining the benefits, etc.

To this complaint the defendants answered, in substance, that on the — day of —, 18—, a judgment was recovered by the Marion Township Gravel Road Company in the circuit court of Shelby county against the plaintiffs Stephen D. Ludlow and Samuel Montgomery, Sr., the deceased ancestor, under whom the other plaintiffs claim title to certain lands in plaintiffs' complaint mentioned, in a certain cause then pending, in which Stephen D. Ludlow and Samuel Montgomery, Sr., were plaintiffs, and the Marion Township Gravel Road Company was defendant, in which the identical facts here in dispute were adjudicated adversely to the plaintiffs below.

The objections which are made to this answer are: 1. That the date of the judgment in which the matters here involved

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are alleged to have been adjudicated is uncertain; and, 2. That the averment in the answer, that the adjudication was had with reference to "certain lands mentioned in the complaint," was not an averment that the adjudication covered the assessments involved in this complaint.

The practice of leaving blank dates in pleadings ought to be corrected by the rigorous interposition of the trial courts, but it is nevertheless not a ground for demurrer.

While it is true that in pleading a former adjudication it is material to set out, among other things, the date on which the judgment was given with certainty, and the court in which it was rendered, yet, if the date given, or attempted to be given, is uncertain, the remedy is by motion to make the pleading more specific by supplying a certain date. *Baugh v. Boles*, 66 Ind. 376.

With respect to the second objection made, all we need say is, that taking the whole answer, and considering its scope, we think it fairly appears that the lands described in the complaint, and the assessments thereon, are the same concerning which the former adjudication was had.

Judgment affirmed, with costs.

Filed March 13, 1885; petition for a rehearing overruled June 10, 1885.

No. 11,578.

PEIRCE v. HIGGINS ET AL.

SURETY.—Subrogation.—Equities of Surety on Appeal Bond Against Purchasers.—A surety on an appeal bond has a right to be subrogated to the lien of the judgment appealed from and paid by him, and his equities are superior to those of a purchaser in good faith who buys the land on which the judgment is a lien after the execution of the appeal bond.

SAME.—Appeal Bond.—Effect of.—The undertaking of the surety in an appeal bond to pay the judgment does not cut off his right to subrogation, and persons who buy after the execution of the bond are chargeable with notice of his right to subrogation.

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From the Shelby Circuit Court.

T. B. Adams and L. T. Michener, for appellant.

B. F. Love, A. Major and H. C. Morrison, for appellees.

ELLIOTT, J.—The contest is here waged between the appellant and James C. Collett, one of the appellees, and it is only necessary to state such facts as relate to that contest. We extract from the special finding and state in an abridged form those facts. On the 9th day of March, 1879, William Peirce, the appellant, bought a tract of land from Martin Higgins, paid the purchase-money in cash and by discharging a mortgage lien existing on the land, and received a warranty deed. On the 3d day of July, 1878, Zerelda Kendall obtained a judgment against Higgins for \$424.14, and the court decreed that the judgment was a lien on the land which Higgins afterwards conveyed to the appellant. In November, 1878, Higgins appealed from that judgment and executed an appeal bond with Collett as surety, wherein it was agreed that Higgins should prosecute his appeal and pay the judgment that might be rendered or affirmed against him in the Supreme Court. The appeal was unsuccessful, and in May, 1881, the judgment was affirmed. Of the judgment in favor of Zerelda Kendall and of the appeal the appellant had notice at the time he bought the land. Sale was made on that judgment and decree, and Zerelda Kendall bought the land for \$686.86 and received a sheriff's certificate. This certificate subsequently passed into the hands of William and Isaac Thompson. In June, 1882, the appellant, to protect his title and prevent eviction, purchased the sheriff's certificate.

It is argued with much force and no little ingenuity, that the appellant by operation of the doctrine of subrogation is entitled to the rights which Zerelda Kendall had against Collett upon the appeal bond. As not infrequently happens, an elaborate argument is sapped by one defect in the foundation upon which it is constructed. A defect in one spot in the foundation of a structure may sometimes overthrow it as

effectually as many, and that happens in this instance. The infirmity here is, that the foundation of counsel's argument rests upon the implied assumption that the purchase from Higgins was made prior to the judgment in favor of Mrs. Kendall and prior to the appeal; while the truth is that the appeal was taken several months before the purchase. This is a ruling fact, and it stands in the appellant's path to success, effectually barring his progress.

The surety in the appeal bond had a right to assume that the judgment bound the land, and that if he was ultimately compelled to pay it, he would be subrogated to the rights of the creditor and could seize and sell the land upon which the judgment lien rested. When the appellant purchased, he was bound to take cognizance of the legal rights of the surety. It is a fundamental principle that a party who has full knowledge of the facts is bound to know their legal consequences. *Trentman v. Eldridge*, 98 Ind. 525; *Anderson v. Hubble*, 93 Ind. 570; S. C., 47 Am. R. 394; *Dodge v. Pope*, 93 Ind. 480, *vide* p. 487; *Barnes v. McKay*, 7 Ind. 301. The essential thing in such cases as this, and in cases of a kindred character, is knowledge of the facts, for, when this exists, knowledge of legal consequences is necessarily implied.

The surety's right to subrogation comes into existence with his contract; his rights flow from that contract and accrue when it is executed. His own acts may impair them; the acts of others can not. These rights continue in undiminished vigor from their inception until the termination of his liability. It needs no particular form of contract to create them, for they are created by law and are legal incidents of the undertaking. Parties who subsequently acquire rights with notice of a lien securing the debt for which the surety has bound himself can not deprive him of his rights to be subrogated to that lien. The plainest principles of justice forbid that a purchaser of land bound by a judgment lien should be preferred to a surety who has undertaken to pay the judgment in order to secure for his principal the benefit of an appeal.

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The surety contracts with reference to the facts existing at the time the contract is entered into, and it is then that his rights are fixed. If, when he enters into the contract, the creditor is secured by a lien on the property of the principal, that lien enures to his benefit, and no subsequent intervening rights can displace those vested in him by the law. The case of *McClung v. Beirne*, 10 Leigh, 394, closely resembles the present, and it was held that the equities of the surety on an appeal bond were superior to those of a subsequent purchaser, the court saying: "I am of opinion that there is no error in the decree in substituting the appellee" (the surety on the appeal bond) "to all the rights and remedies of Callison" (the judgment creditor) "under his original judgment. To the benefit of it he had the clearest right, upon the ordinary and well established principles of the court." This conclusion is in harmony with long settled principles of equity. In speaking of the principle of subrogation, Lord BROUGHAM said, "It is hardly possible to put this right of substitution too high, and the right results more from equity than from contract or *quasi* contract; unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication." *Hodgson v. Shaw*, 3 Mylne & K. 183. This principle has been so often recognized, and the general doctrine of subrogation has been so often discussed by this court, and is so well understood, that we deem it unnecessary to refer to the cases.

It is true that the surety on the appeal bond undertook to pay the judgment, but the principles of equity entered into that contract as a silent but potent factor. The principles of law enter into all contracts, and parties in contracting assume that the law is one of the elements of their contract. It is never necessary to embody the law in an agreement; it goes into it without any express provision. The law entered into the contract of Collett and gave him a right of subrogation, and that element can no more be excluded than can any other. He contracted, therefore, upon the assumption that the lien

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of the creditor would enure to his benefit, for this the law affirms. The law vested in him this right of subrogation just as much as it vests in a surety a right to recover from the principal money which he has been compelled to pay for him. The rights of the surety in this instance were fully fixed before the appellant acquired an interest in the land, and, as one of the rights vested in the surety was that of subrogation to the lien of the judgment which he undertook to pay, the right of the surety to compel the land to pay the judgment is superior to any equity of the appellant. The surety was first in point of time, and, under the well-known equity maxim, must prevail.

As the surety had a clear right of subrogation from the time he entered into the contract of suretyship, he has the senior equity as against the appellant who bought after that right had fully vested, and the latter can not save his land at the expense of the former. The conclusion of the whole matter is that the action against the surety has no foundation, for a surety can not be postponed in favor of a purchaser who purchased with full knowledge of his rights.

The special finding affirmatively shows that no injury resulted to the appellant from the ruling on the motion to strike out part of the complaint, and even if there was error in that ruling, it was a harmless one, not warranting a reversal.

Judgment affirmed.

Filed March 20, 1885.

No. 11,882.

THE AMERICAN CANNEL COAL COMPANY v. SEITZ.

REAL ESTATE.—*Reservation in Deed.—Agreement to Refund Price.—Measure of Damages.*—Where, in deeds of conveyance to separate tracts of land, but which adjoin each other, made at different times, there is a clause reserving minerals, the right of way thereto, and the right to take and use any or all of said land for purposes convenient for mining and transportation, the grantor agreeing to pay actual damages to improvements and

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to "refund the price paid for so much of said land as may be so taken or used, with interest," the measure of damages for the taking of a part of each tract is to be determined by ascertaining what ratio the value of the part so taken bore, at the time of the conveyance, to the value of the whole of the tract from which it was taken, and upon a proportionate part of the price of such tract computing interest to the time of the trial; and the whole damages for the land taken is determined by adding the damages for the parts so taken from the several tracts.

From the Perry Circuit Court.

H. J. May, for appellant.

S. B. Hatfield and *W. Henning*, for appellee.

BLACK, C.—The appellee was the owner of four tracts of land adjoining each other in Perry county, holding them, one as the immediate grantee of the appellant, and the others as its remote grantee.

The deeds of conveyance from the appellant to the appellee and his grantors were warranty deeds, each containing a clause as follows: "Said company reserving the coal and minerals in or under said land, with the right of way thereto, and the right of way to any mine or mines that may be opened or used by said company, its lessees or assigns, on other lands, and the right of taking and using any or all of said land for entries, depots, ways or other purposes, convenient for mining and transporting minerals; said company agreeing to pay for all actual damage to the improvements that may be placed on said land, and refund the price paid for so much of said land as may be so taken or used, with interest."

The appellant, by its agents, entered upon these tracts so owned by the appellee and constructed upon and through them a railroad, to be used in its business of mining and transporting coal. The appellee, not having received compensation for the land so taken and the damage so suffered by him, brought this action therefor.

The only question before us relates to the measure of damages for such a taking of the appellee's land.

One of the deeds of conveyance above mentioned was dated

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March 10th, 1856 ; the tract thereby conveyed contained three and sixty-five one-hundredths acres ; the price expressed was \$87. The quantity taken by the appellant from this tract was one acre and sixty-seven hundredths.

Another deed bore date February 13th, 1860, conveying a tract of ten acres, the price being \$110. The quantity taken by the appellant from this tract was fifty-six hundredths of an acre.

Another deed was executed May 10th, 1860, the tract being seven and thirteen hundredths acres, the price being \$250. Of this tract the appellant took thirty-four hundredths of an acre.

The remaining deed was executed May 6th, 1878 ; the tract conveyed contained four and thirty-one hundredths acres ; the price was \$100. The part taken by the appellant from this tract was twenty-seven hundredths of an acre.

All the land taken by the appellant was cleared land. The portion taken from the tract conveyed by the last mentioned deed, which was the deed from the appellant to the appellee, was cleared when the appellee bought it. The portions so taken which were embraced in the second and third deeds were cleared by the appellant's grantee, who was the grantor of the appellee. The portion taken from the tract conveyed by the first deed had been cleared by the appellee.

The whole quantity of the land so owned by the appellee was about twenty-four acres. The whole quantity so appropriated by the appellant was about three acres.

The appellee asked several of his witnesses, " What portion of the real estate in value was taken by the American Cannel Coal Company ? "

Over objections of the appellant, the witnesses were permitted to answer. One answered : " They took the one-fourth or one-fifth part in value of the whole lands. " Another answered : " About one-fourth or one-fifth of the whole land was taken ; say one-fourth. " Another answered : " The land taken by the company is worth one-fourth in value of all the

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land." Another answered: "Think they have taken one-fourth the land in value, taking it in all." Another answered: "The company has taken from one-fourth to one-fifth in value of all of said land." Another answered: "In my opinion they have taken one-fourth in value of all the land." Two others answered: "One-fourth in value of the whole land was taken." Another answered: "The company has taken one-fifth or one-sixth in value of the whole land."

The measure of damages for breach of covenants for title in deeds of conveyance of land, where there is an entire failure of title, is the whole purchase-money, with interest. If the eviction be from only a specific part of land conveyed for a gross sum, the damages are to be computed by adding interest to the sum bearing the same ratio to the whole purchase-money that, at the time of the conveyance, the value of such specific part of the land bore to the value of the whole land conveyed; that is, for ascertaining on what portion of the purchase-money to compute interest, the relative value, instead of the average value, of the specific part from which there has been an eviction, is to be regarded, and such relative value is to be ascertained with reference to the time of the conveyance, instead of the time of the trial. 4 Kent Com. 475, 477; *Phillips v. Reichert*, 17 Ind. 120; *Hoot v. Spade*, 20 Ind. 326; *Boatman v. Smith*, 50 Ind. 403; *Wood v. Bibbins*, 58 Ind. 392; *First Nat'l Bank v. Colter*, 61 Ind. 153. In the case before us, the deeds provided for the refunding of the price paid for so much of the land as might be taken or used, with interest. If the whole of any tract so conveyed had been appropriated, the damages for the taking thereof would have been the purchase-money of such tract, with interest. If all the tracts had been wholly appropriated, the damages would have been the amount of the damages for the tracts severally. A part only of each tract having been taken, the measure of damages would be analogous to that in actions for breach of covenants for title, where there has been an eviction from a specific part; that

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is, the damages for the part taken from each tract would be determined by ascertaining what ratio the value of the part so taken bore, at the time of the conveyance, to the value of the whole of the separate tract from which it was taken, and upon a proportionate part of the price of such tract computing interest to the time of the trial; and the whole damages for the land taken would be found by adding the damages thus ascertained for the parts taken from the several tracts.

The question to which the appellant objected manifestly called for a comparison, which the witnesses in their answers made, of all the land appropriated from the several tracts with the whole of said tracts considered together, instead of a comparison of the part taken from each tract with the whole of such separate tract; whereby a portion taken from one tract was compared with other tracts conveyed by other deeds at other times; and it is evident that it was intended that the comparison should be made, and that it was made, with reference to the values at the time of the trial instead of the times at which the deeds were made.

It would have been proper to prove the relative value of the part taken from each tract, compared with the whole tract from which it was taken, having reference in making the comparison to the date of the deed by which the tract was conveyed by the appellant.

The question as asked called for and elicited comparisons which did not furnish a proper basis for the computation of damages. All other questions presented by counsel are involved in and decided by what we have said.

The judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellee, and the cause is remanded for a new trial.

Filed April 4, 1885.

Allen et al. v. Davis.

No. 10,601.

ALLEN ET AL. v. DAVIS.

101	187
128	22
101	187
137	550
101	187
144	15
144	94
101	187
150	326

MARRIED WOMAN.—*Mortgage of her Real Estate to Secure Husband's Debt.*—

Under the statute, R. S. 1881, section 5119, a married woman can not execute a binding mortgage upon her real estate to secure her husband's debt.

WITNESS.—*Contradictory Statements.*—*Evidence of, for Impeachment Only.*—

The contradictory statements of a witness, introduced on cross-examination to impeach him, can only be considered for that purpose, and can not be regarded as substantial proof of the facts in dispute between the parties.

SAME.—The contradictory statements of a husband, in the absence of his wife, on a former trial between other parties, about the property for which the note and mortgage in suit were given, while competent for the purpose of impeachment, are not evidence against the wife in this suit.

From the Grant Circuit Court.

W. L. Lenfesty and J. H. Compton, for appellants.

J. F. McDowell, G. L. McDowell, T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and E. Daniels, for appellee.

FRANKLIN, C.—Appellee sued appellants on a promissory note, and to foreclose a mortgage given to secure its payment. Appellant Joseph G. Allen was defaulted. Mary E. Allen appeared and defended. She answered that at the date of the execution of the note and mortgage, to wit, on the 21st day of September, 1881, she was a married woman, and the owner of the real estate described in the mortgage; that the note was given for a debt of her husband and co-defendant, Joseph G. Allen, and that she executed the note and mortgage jointly with him as his surety. Issue was formed by a denial in reply.

There was a trial by the court, finding for the plaintiff, and over a motion for a new trial by Mary E., judgment was rendered for the plaintiff. She has appealed to this court, and notified her husband of the appeal, who has appeared and declined to join in the appeal.

Allen *et al.* v. Davis.

The error complained of by appellant Mary E. is, that the court erred in overruling the motion for a new trial. The reasons stated for a new trial are, that the finding of the court is not sustained by sufficient evidence, and is contrary to law.

The finding of the court was for the plaintiff, that both the defendants had executed the note and mortgage, for the amount due thereon to the plaintiff. No personal judgment was rendered against Mary E., but a judgment and decree of foreclosure of the mortgage was rendered against both of them. The mortgage contained an express promise to pay the money secured.

Appellant insists that the note and mortgage are both void as to her, and can not be enforced against her. The transaction occurred after the Acts of 1881 went into force, the provisions of which, so far as applicable to this case, read as follows :

Section 5115. "All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided."

Section 5116. "No lands of any married woman shall be liable for the debts of her husband; but such lands, and the profits therefrom, shall be her separate property, as fully as if she were unmarried: *Provided*, That such wife shall have no power to encumber or convey such lands, except by deed in which her husband shall join."

The last part of section 5117 reads as follows: "But she shall not enter into any executory contract to sell or convey or mortgage her real estate, nor shall she convey or mortgage the same, unless her husband join in such contract, conveyance, or mortgage: *Provided, however*, That she shall be bound by an estoppel *in pais*, like any other person."

Section 5119. "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void."

The court doubtless came to the conclusion, from the evidence, that she signed the note as security for her husband.

Allen *et al.* v. Davis.

The record shows that the court found that they both executed the note, and the mortgage to secure its payment, and found the amount due the plaintiff on the note, and then gave a personal judgment against the husband, but none against the wife, and rendered a decree of foreclosure of the mortgage against both of them. If she was not bound by the note because she was security on it, we do not see how she could be bound by the mortgage, for she was as much security in the mortgage as she was in the note, and the promise to pay the debt in the mortgage could be no more binding upon her than the promise contained in the note to pay the same debt of her husband; if a security in part, she must have been security in whole. But as the court found against her as to the mortgage, it becomes necessary to examine the evidence.

The reasons stated for a new trial are, that as to appellant the evidence was not sufficient to sustain the finding, and that the finding was contrary to law.

Appellant testified in her deposition, that at the date of the execution of the note and mortgage sued on, she was a married woman and the wife of her co-defendant; that the note was given for the debt of her husband, and the mortgage given to secure its payment; that she owned the mortgaged lands, and signed the note and mortgage as security for her husband, and not otherwise; that she had no interest in the matter other than any other wife would have in her husband's transaction. The husband's evidence corroborated the wife's deposition. In cross-examination of the husband, appellee attempted to impeach his testimony by asking him if he had not stated upon a former trial, between other parties, about the mill for which the note was given, that he had bought the mill as agent of his wife and for her use, which he denied. Other impeaching witnesses were offered, who testified that upon said former trial he had so stated.

While this impeaching testimony was competent to contradict and impeach the husband's testimony in this case, it

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was no evidence against the appellant of the fact that the husband had bought the mill as the agent of his wife and for her use. If he had so formerly testified, it was in her absence, and she could not be bound or affected by it. The contradiction was only admitted in evidence for the purpose of impeachment. This was all the evidence given in the case.

The facts in appellant's answer were fully proved, and there was no evidence in conflict therewith. The finding of the court against appellant, as to the mortgage, was not sustained by the evidence, nor was there any evidence tending to sustain it. The court erred in overruling the motion of appellant for a new trial.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded with instructions to the court below to sustain appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

Filed Jan. 11, 1885; petition for a rehearing overruled June 27, 1885.

No. 11,517.

BRUMFIELD ET AL. v. DROOK ET AL.

101	199
124	545
136	653
101	190
138	511
101	190
140	459
143	438
101	190
147	428
101	190
150	314
150	342
152	588
101	190
162	336
101	190
168	173

WILLS.—*Construction of.*—All the parts of a will are to be construed in relation to each other so as, if possible, to form one consistent whole, and so as to uphold all of its provisions, if this can be done consistently with established rules of law.

SAME.—*When "Heirs" will be Construed "Children."*—The word "heirs," as used in a will, will be construed to mean "children" when it is apparent that the testator employed it in that sense.

SAME.—*Life-Estate.*—*Devise to a Daughter "and her Heirs, Subject to their Control Only."*—*Executor.*—*Naked Power to Sell.*—A testator, after devising a life-estate in land to his wife, directed his executors, after her death, to "sell and dispose of all my property, both real and personal, that may remain, * * * and divide the proceeds thereof among my ten

Brumfield *et al.* v. Drook *et al.*

children, in the following manner, or their heirs, as the case may be, to-wit," to each son one-tenth, and to each daughter, naming each separately, and following each name with the words, "and her heirs one-tenth, subject to their control only, it being my intention that my said daughters and their children shall have the sole benefit of their shares of my estate." Before the death of the widow four daughters conveyed away their interest in the land.

Held, that each daughter took one-tenth of the proceeds of such property free from the control of her husband, and in case of her death her children would take such portion, but until then such children have no interest in the estate.

Held, also, that a mere naked power to sell having been conferred upon the executors, they were not invested with any interest in or title to the property.

Held, also, that during the life-estate of the mother, the title was not in abeyance, but it was in the testator's children, and the conveyances by the daughters, during such life-estate, divested them of title to the land and precludes them from claiming any interest in its proceeds.

PLEADING.—*Complaint Must be Sufficient as to all Plaintiffs.*—A complaint must be sufficient as to all the plaintiffs, or it is not sufficient as to any.

From the Grant Circuit Court.

H. J. Paulus and *G. T. B. Carr*, for appellants.

A. Steele, *R. T. St. John* and *T. D. Evans*, for appellees.

BEST, C.—On the 22d day of December, 1860, John Drook made his last will, and on the 16th day of March, 1870, he died the owner of considerable personal property and a quarter section of land in Grant county, in this State, leaving surviving him his widow, Saloma Drook, and ten children, five sons and five daughters, viz., Daniel F., Jacob F., William F., Alfred F., James Monroe F., Mary F. Brumfield, Marilles F. Taylor, Susanna F. Anderson, Cynthia F. Fisher and Martha F. Snyder, now Martha F. Warrenburg. Each of these daughters, at the time of their father's death, had from six to ten children, and they and their children bring this action against the five sons of said testator, one of whom was the administrator with the will annexed, and several other persons, three of whom had purchased from four of said daughters the interest they acquired in said real estate by virtue of said will.

The complaint consisted of three paragraphs, to each of

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which separate demurrers, for the want of facts, by the administrator and by two of the purchasers, were sustained, and these rulings are assigned as errors.

The paragraphs are substantially alike, and aver, in substance, that the last will of said testator was duly probated, and by its terms the real estate was devised and the personal property bequeathed to the widow for life; that she accepted the provision thus made for her, took possession of said property, and retained the same until her death, which occurred on the 6th day of March, 1883; that the executors named in the will were directed to sell said property after the death of the widow, and divide the proceeds between the testator's sons and his daughters and their children, giving to each son one-tenth and to each daughter and her children one-tenth; that the persons named in said will as executors failed to qualify, and that thereupon Jacob F. Drook, one of said sons, qualified as administrator with the will annexed; that thereafter said administrator obtained an order from the proper court to sell said land, and, in pursuance of said order, on the 2d day of June, 1883, he sold the same to William Highly, one of the appellees, for \$6,579.37, one-third of which was paid in cash, and the residue was secured by notes, one-half of which was payable in one and the other in two years from the day of sale; that said administrator still holds said money and said notes for distribution under said will; that before the death of said widow, to wit, in March, 1882, four of said daughters, viz., Mary F. Brumfield, Susanna F. Anderson, Cynthia F. Fisher and Martha F. Warrenburg, conveyed their interests in said land to William Drook, one of the appellees, and that neither they nor their children had any notice of the application by said administrator for an order to sell such real estate. Prayer that said conveyances be set aside, that the sale of said real estate be vacated, and that the will of said testator be construed so as to give each of said daughters and their children a tenth of the proceeds of said land.

A copy of the will accompanied the complaint. After giv-

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ing directions for the appraisement of the property and for the payment of debts, the testator proceeds :

“I also direct that so much of my personal estate be sold at public sale as shall be necessary to pay just debts as soon as possible. The remainder thereof, if any there be, I give and bequeath unto my wife, Saloma, to remain her absolute property if she shall be living at the time of my decease. And if there should be more than she needs, she may give it into the hands of my executors, and they shall dispose of the same at public sale, and divide the proceeds thereof equally among my surviving children, or their heirs in case of the death of any of them, in way and manner hereafter directed. I also direct that my wife, Saloma, have the full possession and care of my farm whereon I live during her lifetime. I also direct that my executors shall, after the decease of my wife, sell and dispose of all my property, both real and personal, that may remain, at public sale, except one-half acre for burying ground where the graveyard now is, and divide the proceeds thereof among my ten children in the following manner, or their heirs, as the case may be, to wit: *First*. I give to my son Daniel F. Drook one-tenth, to my son Jacob F. Drook one-tenth, to my son William F. Drook one-tenth, to my son Alfred F. Drook one-tenth, and to my son James Monroe F. Drook one-tenth of the same. Also, to my daughter Mary F. Brumfield and her heirs one-tenth, subject to their control only, to my daughter Marilles F. Taylor, wife of Robert Taylor, and her heirs one-tenth, subject to their control only, to my daughter Susanna F. Anderson, wife of James Anderson, and her heirs one-tenth, subject to their control only, to my daughter Cynthia Ann F. Fisher, wife of David Fisher, and her heirs one-tenth, subject to their control only, and to my daughter Martha Emeline F. Snyder, wife of Philip Snyder, and her heirs one-tenth, subject to their control only, it being my intention that my said daughters and their chil-

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dren shall have the sole benefit of their shares of my estate, both real and personal."

The foregoing is the portion of the will upon which the questions in this case turn.

The appellants insist that the word "heirs," wherever it occurs in the will, was employed by the testator in the sense of "children," and in this conclusion we concur, as we think the last clause in the will puts this question beyond debate. The statement of the testator that he intends that his "daughters and their children shall have the sole benefit of their shares," renders it obvious that in naming them he designated the children as heirs. This being apparent, the word will thus be construed. *Rapp v. Matthias*, 35 Ind. 332; *Brown v. Harmon*, 73 Ind. 412; *Ridgeway v. Lanphear*, 99 Ind. 251.

The appellants also insist that each daughter and her children took one-tenth of the estate as tenants in common, or as joint tenants, or that each daughter took a life-estate in such tenth, and her children the estate in remainder. This position is based upon that portion of the will which directs a division of the proceeds arising from a sale of the property, in these words: "To my daughter," naming her, "and her heirs one-tenth, subject to their control only." If this were the only clause in the will by which such portion of the estate was devised, we would not be prepared to say that each daughter and her children would not have taken such part of the estate as tenants in common. This, however, is not the only clause. There are other clauses in the will that bear directly upon this question, and all of them must be considered in determining the intention of the testator. In a former part of the same general disposition of the property, the testator directs that such personal property as shall remain shall be sold by his executors and the proceeds be "divided equally among my surviving children or their heirs, in case of the death of any of them, in way and manner hereafter directed." This clause is definite and fixes the fact that the proceeds of the personal property are to be divided

equally between the testator's children, in way and manner thereafter directed. The grandchildren, by this clause, as their parents are all living, are not entitled to any portion of such property. The testator, after devising a life-estate in the land to his wife, also directs his executors, after her death, to "sell and dispose of all my property, both real and personal, that may remain, * * * and divide the proceeds thereof among my ten children in the following manner, or their heirs, as the case may be, to wit." By this clause the testator makes precisely the same disposition of the proceeds of the real as of the personal property, and the same disposition as the prior clause made of the proceeds of the personal property. Neither clause gives any portion of the proceeds to the grandchildren in case the testator's own children survive him, but in that event the whole is given to such children in equal portions. The way and manner of the division, however, has not yet been more particularly indicated, and in doing this the testator gives to each son one-tenth, and to each daughter says, "to my daughter," naming her, "and her heirs one-tenth, subject to their control only." It is manifest from this language that the testator intended to exclude the husbands of his respective daughters from acquiring any interest in or control over such estate, and we think this was the testator's only purpose in the employment of such language. In the same general disposition, he had already twice explicitly stated that this property was to be equally divided between his ten children, or their heirs in case of the death of any of his children, and it seems improbable that he changed his mind and concluded to divide the one-tenth of such property between each daughter and her children. Had such change of disposition been intended, the testator would probably have employed language that would have clearly indicated such purpose, in view of the fact that a contrary intention had already been twice explicitly expressed. Inasmuch as he did not, we do not think the mere employment of the conjunction "and," instead of "or," be-

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tween the words "daughters and heirs," and "daughters and children," can control the manifest intention of the testator, as is apparent from the explicit clauses previously inserted, and from the general scheme of the whole instrument. All the parts of a will are to be construed in relation to each other so as, if possible, to form one consistent whole, and so as to uphold all of its provisions, if this can be done consistently with established rules of law. *Jackson v. Hoover*, 26 Ind. 511; *Grimes v. Harmon*, 35 Ind. 198; S. C. 9 Am.R. 690.

Construing this will in accordance with these rules, we have no doubt that the testator intended each daughter to take one-tenth of the proceeds of such property free from the control of her husband, and in case of the death of such daughter, her children should take such portion. We, therefore, conclude that the grandchildren had no interest in this estate.

It is next insisted that the title to the land vested in the executors, and that, consequently, the deeds of conveyance executed by four of the daughters were inoperative to convey any estate, and that each of said daughters is entitled to the one-tenth of the proceeds of the sale of said land. The language of the will bearing upon this question is in these words: "I also direct that my executors shall sell and dispose of all my property, both real and personal, * * * and divide the proceeds among my ten children," etc. This direction conferred upon the executors a mere naked power to sell, and did not invest them with any interest in or title to the property. In the absence of a statute, the rule is universal that where an executor is merely clothed with the power to sell he takes no title to the property. 1 *Perry Trusts*, section 308; *Williams Ex'rs*, p. 725; 1 *Sugden Vendors*, p. 175, and authorities cited.

This rule prevails in this State, and it has frequently been held that such direction as this will contains merely confers upon the executor a naked power to sell. *Doe v. Lanius*, 3 Ind. 441; *Thompson v. Schenck*, 16 Ind. 194; *Wilson v. Rudd*, 19 Ind. 101; *Simonds v. Harris*, 92 Ind. 505.

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The power conferred upon the executors to sell being a naked one, the title did not vest in them, but must have vested in the testator's children, subject to be divested by the execution of the power. During the life-estate of the mother the title was not in abeyance, and as it was not in the executors, it must have been in the testator's children by virtue of the devise or by the law of descents—probably by the law of descents. This was expressly ruled in the case of *Doe v. Lan-ius, supra*.

The title being in the children, it follows that the conveyances by the four daughters during the life-estate of the mother divested them of any title to the land, and, consequently, precludes them from claiming any interest in its proceeds. *Simonds v. Harris, supra*.

As four of the daughters and all of the grandchildren of the testator have no interest in the proceeds of the sale of this land, they can not maintain an action to set aside the sale made by the administrator, and as the complaint, for this purpose, was insufficient as to them, it follows that it was insufficient as to all who united with them. A complaint must be sufficient as to all, or else it is not sufficient as to any of the parties. *Lippard v. Edwards*, 39 Ind. 165; *Nave v. Hadley*, 74 Ind. 155, and cases cited.

For these reasons we think the demurrers were properly sustained, and that the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be affirmed, at the appellants' costs.

Filed April 4, 1885.

No. 11,399.

THE EVANSVILLE AND TERRE HAUTE RAILROAD COM-
PANY v. TIPTON.

RAILROAD.—*Killing Stock.—Complaint.*—"Sufficiently Fenced."—In an action under the statute, against a railroad company for killing stock, a com-

101	197
194	213
101	197
134	683
136	186

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plaint averring that the railroad track was not "sufficiently fenced" at the place where the animals got on the track and were injured and killed, sufficiently alleges that the track was not "securely fenced," as required by the statute, and is good on demurrer.

SUPREME COURT.—*Weight of Evidence*.—Where there is evidence tending to support the verdict, the Supreme Court will not disturb it on the weight of the evidence.

From the Sullivan Circuit Court.

A. Iglehart, J. E. Iglehart and E. Taylor, for appellant.
J. C. Briggs, for appellee.

COLERICK, C.—This action was instituted by the appellee to recover the value of two horses, one of which was killed and the other injured on the appellant's railroad at a place not securely fenced. The issues were tried by a jury, who returned a verdict in favor of the appellee for \$200, upon which, over a motion for a new trial, judgment was rendered against the appellant, from which it has appealed, and assigns as errors that the court below erred in overruling a demurrer to the complaint, and in overruling the motion for a new trial.

The only objection that has been made by the appellant in this court to the sufficiency of the complaint is, that it was averred therein that the railroad track was not "sufficiently fenced" at the place where the horses got on the track, and where they were injured and killed. It is insisted by the appellant that the words "sufficiently fenced" merely averred a conclusion, rather than a fact. The language used in the statute, under which the action was instituted, is "securely fenced." We think the word "sufficiently," as used in the complaint, is of the same import and meaning as the word "securely," and hence no error was committed by the court in overruling the demurrer to the complaint.

Of the reasons assigned in support of the motion for a new trial, the sole one presented by the appellant for our consideration is, that the verdict was contrary to the evidence, and was not sustained by sufficient evidence, in this, that the evidence, which is in the record, showed that the animals were

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injured and killed at a place on the railroad where the appellant was not bound to fence. Upon an examination of the evidence we find that the appellant introduced evidence tending to prove that the construction of a fence at the place where the animals got on the track, and where they were injured and killed, would have interfered with the rights of the appellant in operating its railroad and transacting its business, and with the rights of the public in travelling over and along an adjacent highway. This evidence was competent, as it is settled in this State, by the decisions of this court, that a railroad company is not required to fence in its railroad at such places, and is not liable to the owners of animals injured or killed at such places by its locomotives or cars in consequence of the absence of fences. *Indianapolis, etc., R. R. Co. v. Oestel*, 20 Ind. 231; *Jeffersonville, etc., R. R. Co. v. Beatty*, 36 Ind. 15; *Indianapolis, etc., R. R. Co. v. Christy*, 43 Ind. 143; *Ohio, etc., R. W. Co. v. Rowland*, 50 Ind. 349; *Louisville, etc., R. W. Co. v. Francis*, 58 Ind. 389; *Wabash R. W. Co. v. Forshee*, 77 Ind. 158; *Cincinnati, etc., R. R. Co. v. Wood*, 82 Ind. 593; *Evansville, etc., R. R. Co. v. Willis*, 93 Ind. 507; *Wabash, etc., R. W. Co. v. Nice*, 99 Ind. 152; *Fort Wayne, etc., R. R. Co. v. Herbold*, 99 Ind. 91.

But whenever and wherever the company can fence in its railroad without such interference, it must do so, or be held liable for all damages occasioned by such omission. *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380; *Banister v. Pennsylvania Co.*, 98 Ind. 220. And the burden of showing that a fence could not properly have been maintained at the *locus in quo* rests on the company. *Indianapolis, etc., R. R. Co. v. Lindley*, 75 Ind. 426; *Terre Haute, etc., R. R. Co. v. Penn*, 90 Ind. 284; *Louisville, etc., R. W. Co. v. Clark*, 94 Ind. 111. It is also, in like manner, settled that if there is sufficient space between a railroad and a highway for the company to fence in its railroad, it must do so, even if it is compelled thereby to locate the fence on part of its reservation for a right of way, *Wabash R. W. Co. v. Forshee*, *supra*;

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Banister v. Pennsylvania Co., supra; because it is as much the duty of the company to fence against animals on highways as those in adjoining fields and woods. *Evansville, etc., R. R. Co. v. Barbee*, 74 Ind. 169; *Pittsburgh, etc., R. R. Co. v. Ehrhart*, 36 Ind. 118; *Louisville, etc., R. W. Co. v. Porter*, 97 Ind. 267.

The evidence so introduced by the appellant, for the purpose of showing that no legal obligation rested upon it to erect and maintain a fence at the place where the animals were injured and killed, was conflicting in its material aspects, and was met by opposing evidence introduced by the appellee. It is neither our duty nor privilege to consider this conflicting and contradictory evidence for the purpose of reconciling it or determining its preponderance. It related exclusively to questions of fact, to be determined by the jury under proper instructions by the court, which were given. As there was evidence, as to the controverted facts, tending to sustain the verdict, we can not disturb it on the weight of the evidence. The motion for a new trial was properly overruled by the court.

This disposes of all the questions submitted for our consideration, and as there is no error in the record the judgment should be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed April 4, 1885.

No. 11,599.

THE CITY OF INDIANAPOLIS v. KINGSBURY ET AL.

STREETS.—Plats.—Dedication by Commissioners in Partition Proceedings.—It is competent for commissioners in partition proceedings, acting under the orders of a court of competent jurisdiction, to make a subdivision of the land into lots, and to dedicate streets and alleys to the public on the plats made by them.

101	200
124	579
127	136
101	200
133	334
101	200
136	14
101	200
137	254
138	571
139	675
101	200
141	609
101	200
145	25
101	200
148	106
148	629
149	281
149	282
150	485
101	200
157	335
101	200
162	500
162	501

The City of Indianapolis v. Kingsbury *et al.*

SAME.—Guardian's Authority to Dedicate.—A guardian of an infant has authority, when so ordered by a court of competent jurisdiction, to subdivide the lands of the ward and to dedicate streets and highways to the public.

SAME.—Plat.—What Indicates Dedication.—When the shape, lines and dimensions of a space marked on a recorded plat indicate that it is a street, there is a valid dedication of the space so indicated, although there are no formal words of dedication, and although the space is not in express terms designated as a street.

SAME.—Continuing Way on Second Plat.—Where the land owner makes and records a plat, on which there are lines marking a way, and he afterwards makes and records a second plat on which the way is continued of the same width as on the first plat and is marked "Highland street," and lots are sold with reference to such plats, it will be conclusively presumed that the way throughout its entire length is a public one.

SAME.—Rights of Abutting Owners.—The conveyance of land bounded by a street conveys the fee to the center of the street, and also conveys an interest in the street, as a street, of which the abutter can not be deprived except by seizure under the right of eminent domain.

SAME.—Plat.—Right of Lot Owners to Streets.—Purchasers of lots have a right to have all the streets marked on the plat by which they purchased kept open as streets, and their rights are not confined to the part of the street in front of the lots purchased by them.

SAME.—Implied Dedication.—It is not necessary that a dedication should be evidenced by a writing, but it may be presumed from the acts and conduct of the owner.

SAME.—Intent.—It is necessary, to constitute a valid dedication, that there should be an intent to dedicate the land to a public use, but the intent which the law regards is that which the open acts of the owner indicate and not a secret intent.

SAME.—When Intent Inferred.—Where the acts and conduct of the landowner are such as fairly and naturally lead to the conclusion that he intended to dedicate the land to the public use, and others have in good faith acted upon his open acts and conduct, he will not be permitted to aver that there was no dedication, but the law will conclusively infer that he intended what his acts and conduct indicated.

SAME.—Plat.—Where ways are shown on recorded plats and there appear as streets, they will be so regarded, unless there is in the plats an express provision to the contrary, and no acts or conduct of the owner can change the effect of the dedication evidenced by the plat.

SAME.—Intent to Dedicate.—When it may be Rebutted.—An intention to dedicate may be rebutted when there is an implied dedication, but not when there is an express dedication.

SAME.—Rebutting Presumption of Dedication.—Evidence.—One of the usual

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methods of rebutting the presumption of dedication is by evidence that a gate was swung across the way, but this will not rebut an intent to dedicate in case of an express dedication, nor will it do so in cases of implied dedication where the other evidence in the case shows that there was an intent to dedicate and that rights were acquired upon the faith that such an intent did in fact exist.

SAME.—User.—Time.—User by the public, with the consent of the owner, for such length of time that public accommodation and private rights might be materially affected by an interruption of the enjoyment, is sufficient to raise a presumption that the owner intended a dedication to the public.

SAME.—Change of Private Way to Public.—A private way, no matter how long or how much used by the public, can not be transferred into a public way without the consent of the owner, but when the owner does consent, and the public accepts, the change may be made.

SAME.—Partition.—Married Woman.—Where proceedings in partition are pending, and one of the parties marries, the validity of the dedication made by the commissioners will not be affected by such marriage.

SAME.—Married Woman.—A dedication may, in some cases, be presumed against a married woman, although there is no formal deed executed by herself and husband.

SAME.—Questions of Law and Fact.—Whether land was or was not dedicated to the public is not a conclusion of law, but is a question of fact to be decided upon the evidence.

PRACTICE.—Special Finding.—Conclusions of Law.—Conclusions of law erroneously cast into the finding of facts do not control, for the court acts upon the facts found.

From the Shelby Circuit Court.

C. S. Denny, for appellant.

G. W. Galvin, E. P. Ferris, W. W. Spencer and J. S. Ferris, for appellees.

ELLIOTT, J.—The appellees claim title to a strip of land in the city of Indianapolis, and brought this action to quiet title. On their application the venue was changed to the Shelby Circuit Court, and the case comes to us upon the special finding of facts and conclusions of law stated by that court.

The character of the case made it difficult to make a clear and concise special finding, and that made by the court is very lengthy and much confused, for it blends matters of evidence with matters of fact, and mingles them with matters of law.

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It has been a task not free from difficulty to eliminate immaterial matters and extract the material facts from the mass, but we have gathered the material facts and condensed them in the following synopsis: Noah Noble died the owner of the eighty-acre tract of land within which the strip claimed by the appellees is situated, and by his will gave his wife a life-estate, and to the children of a deceased daughter the fee in the land passed by the will and by subsequent partition; those children are Dorman, Preston and Susan Davidson, and Catharine Miller, now a married woman. In 1866 a partition was adjudged between the heirs of Noah Noble, and the land, of which the strip in controversy forms a part, was set off to Susan, Noah and Catharine Davidson, except that part of the land which lies south of Market street. Before the partition was made eight acres were sold by order of the court upon the petition of the guardian, and embraced in this eight-acre tract is that part of the strip here in dispute, which extends north from Washington street three hundred and thirty-three feet. To this sale Dorman N. Davidson, an adult devisee, consented, and, at the same term of court, he joined the guardian in petitioning the court to direct that the eight acres should be subdivided into town lots before sale, and upon this petition an order was made directing the subdivision, and also directing that a plat should be made. Pursuant to this order a plat was made and reported to the court, and a proper order was entered approving it. The plat was acknowledged and recorded according to law. In the explanation annexed to the plat it was recited that it embraced eight acres, more or less, and that Market street, sixty feet in width, was donated to the public, but no mention was made of the strip here the subject of dispute. The plat, however, shows the dimensions of the lots laid out, and shows, also, a strip fifty feet in width extending north from the National Road, or what is now called Washington street, to Market street. This strip appears on the plat as a way, but it is not designated as a public street, nor is it numbered as a lot, although the lots on

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each side of it are appropriately and regularly numbered. The guardian of the minor devisees and Dorman N. Davidson sold lots numbered one to seven inclusive, as shown by the recorded plat, to divers persons, and these deeds were duly reported to the court and received its approval. Under these conveyances the grantees have entered into possession, and some of them have made valuable and permanent improvements. On lots designated on the plat as number two and number three houses were erected on the east and on the west side of the fifty-foot strip as early as the year 1866. This strip was never sold.

The finding recites that there was an agreement between the guardian and Dorman N. Davidson that this strip should be reserved as a private way, but there is no finding that this was known to the court, nor is there any finding that the city, or any of the purchasers of lots, had actual or constructive notice of this agreement. About the time the petitions referred to were filed, the devisees of Noah Noble had opened up a drive-way over the line of the strip in dispute, from the family residence to the National Road, and a gate was swung across the way on the north side of the National Road, but in 1866 this gate was discontinued. In 1863 the purchasers of lots two and three built fences along the line of the street for the purpose of enclosing their lots. In April, 1868, Susan Lavalette Davidson, Catharine Davidson, now Catharine Miller, the appellee, and Dorman N. Davidson, instituted proceedings for partition of the lands lying north of Market street, and, in December of that year, a decree of partition was entered, and it was also decreed that the commissioners appointed to make partition should lay the land off into lots, streets and alleys. Pursuant to this decree the land was laid off and a plat made, this plat received the approval of the court and was duly admitted to record. On this plat is a way designated as Highland street, extending north from Market street and continuing in a direct line, and of the same width as the way which appears

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on the plat of June, 1863, as extending south from Market street to the National Road. It appears that on the 31st day of December, 1868, the parties inspected and approved the plat made by the commissioners. At this time the appellee Catharine Miller was a married woman, having been married in October of that year. After the gate on the north side of the National Road was abandoned, in 1866, another gate was placed across the way at a point about two hundred feet north of Market street, and this gate remained until the autumn of 1869, when it was abandoned. The finding states that the purpose for which this gate was placed across the way was to keep cattle off the Davidson lands. Since that time there have been no obstructions across the way, and the whole length of Highland street, from the National Road to the northern terminus of the street, was freely used by the public. Previous to 1869, a lot had been sold to James L. Mitchell, situated on the corner of Market street, and, with the exception of the cost of improving in front of that lot which was paid by Mitchell, Dorman N. Davidson graded and gravelled, at his own expense, Highland street from Market street north. As early as 1876, James G. Douglass constructed a stone sidewalk along the front of lot two, then and for some time prior to that date, owned by him. Prior to the year 1869, the city of Indianapolis constructed a board sidewalk along the east side of Highland street, and diagonally across some open lots, for the convenience of children attending a public school. In 1871, the city constructed a large public cistern at the intersection of Market and Highland streets for use of the fire department of the municipality. James L. Mitchell bought his lot in 1869, and bought with reference to the strip now called Highland street, as a public street, and in 1877, all of the devisees of Noah Noble joined in a deed to Mitchell, describing his lot as bounded by Market and Highland street, and a like mention of the latter street is made in a deed to James G. Douglass, executed in September, 1877, and in May, 1873, Mrs. Miller

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and her husband joined in a deed conveying to the city land for the purpose of widening Ohio street, and in this deed reference is made to Highland street. In April, 1881, Maria G. Cooper bought from Joseph L. Fisher, a remote grantee of Mrs. Miller and her associate owner, a part of lot two in the subdivision of 1868, and on that lot Mrs. Cooper built a house to front on Highland street, with a side front on Ohio street, and there are no other means of egress or ingress to and from the main front except Highland street. A public school house was erected by the city in 1878, about three hundred feet east of Highland street. This school house is built of brick, is two stories high, contains eight rooms, and is the only school house in the school district. Highland street affords the most convenient means of going to and from the school house, and if it is closed a great number of children will be compelled to travel about three squares out of their way to reach it.

Ordinances for the improvement of the street from the National Road north were introduced in the common council, but, owing to a disagreement of the adjoining property-owners as to the grade which should be established, they were not adopted. A remonstrance signed by Mrs. Miller and the other devisees of Noah Noble was addressed to the common council in 1878, in opposition to a proposition to improve the street. This remonstrance speaks of Highland street as a public street of the city, calls it by that name, and protests against bouldering the gutters as extravagantly expensive, and protests upon the further ground that there are suits pending to determine the title to adjoining lots, but no question is made as to the highway being one of the public streets of the city; on the contrary that fact is fully affirmed. No taxes have ever been paid upon the strip in dispute since the making and recording of the plat of 1863. All of the devisees of Noah Noble, on the 3d day of November, 1881, united in a deed purporting to convey the strip of land from the National Road north to George W. Galvin and Mary K. Galvin,

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and these parties afterwards joined in a deed professing to convey it to Sarah S. Kingsbury, and she afterwards executed a deed for the one undivided half to Catharine Miller.

Conclusions of law were thus stated:

"1st. As to all that land in controversy north of the south line of Market street, I find that the plaintiffs are not the owners thereof, but that the same has been dedicated to the public for street purposes.

"2d. As to all that part of the land lying south of the south line of Market street, and lying between Market street and Washington street, I find that this real estate has never vested in the public in any way, and that the plaintiffs are the owners in fee, and that the defendant is asserting an unfounded title thereto, adverse to the plaintiffs, and that plaintiffs' title thereto should be quieted."

The appellant assigns error upon its exception to the second conclusion of law, and the appellees allege cross errors upon the first conclusion.

The first conclusion of law is clearly right. The plat was made by commissioners acting under the order of the court, and upon the petition of the adult owner and some of the infant owners, and the plat made by the officers of the court, pursuant to its order, was approved, after inspection, both by the court and the parties. We can see no reason why a court possessing plenary jurisdiction may not direct a subdivision of land into town lots in cases where the adult owners consent, and it is made to appear that such a course will enhance the value of the property and promote the interests of the infant owners. It is perfectly clear that if adult tenants in common should, without objection, suffer an order to be entered directing that the land be laid out into town lots, the plat made by the commissioners pursuant to the order would be operative against them, and a decree in partition is just as effective against infants, when they are properly in court and duly represented by guardian, as it is against persons of full age. Tyler *Infancy and Coverture*, p. 175. A court having

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jurisdiction in matters of partition, and having jurisdiction of the persons of the parties, may order the land to be laid out into lots, and highways to be dedicated to the public. *Earle v. Mayor, etc.*, 38 N. J. Law, 47; *Clark v. Parker*, 106 Mass. 554. But we need not rest our decision upon adjudged cases alone, for we have a statute fully recognizing the principle declared in the adjudged cases. Acts 1859, p. 159. If, in any case, there could be doubt as to the validity of such a decree as that rendered in the partition suit of 1868, there can be none in a case where the decree has been confirmed by unequivocal acts and conduct, and here the confirmation of the course of the commissioners and the decree of the court has been manifested in the amplest and most satisfactory manner, both by conduct and by conveyances.

The questions presented by the second conclusion of law stated by the court are essentially different from those presented by the first. The plat of the addition bounded on the south by the National Road, and on the north by Market street, was made by order of the court and by the guardian of infant owners of land. We think that a guardian, acting under the order of a court of competent jurisdiction and proceeding in conformity to the order of the court, has authority to lay out additions to cities and towns, and if the authority to lay out such additions does exist, then there must also exist the incidental authority to dedicate lands to the public for streets and alleys. It would be illogical and unreasonable to affirm the existence of the principal and yet deny the existence of the incidental power. Courts have ample authority over the estate of infant wards, and may direct the sale of their real property when it will promote their welfare, and within this general and comprehensive authority is the implied one that the court may determine what course will best subserve the interests of the ward, and this course it may direct the guardian to pursue. To be sure, the provisions of the statute must govern, and the discretion of the court can not be exercised in such a manner as to infringe upon any statutory

rule, but in directing that plats be made and streets and alleys be laid out the court having jurisdiction of the matter of the guardianship does not contravene any statute; on the contrary it obeys the legislative enactment. Acts of 1853, p. 74.

The plat executed by the guardian in June, 1863, exhibits the strip of ground extending from the National Road north to Market street, and it is represented as a way, and its width is stated to be fifty feet. It is not numbered as a lot, nor does it correspond in form or dimensions with the lots which the plat exhibits. It is true that it is not named as a street, but its shape, situation and dimensions show it to be a way of some kind. We know, as matter of general knowledge, that the boundaries of lots, of streets, alleys and other ways, are usually indicated upon plats by appropriate lines, and we can, therefore, determine from the face of the plat before us that the lines marking the boundaries of the strip indicate a way of some kind. It is not necessary that in the explanation attached to a plat there should be a minute description of all the ways laid out upon it, for it is sufficient if the lines and figures used indicate the existence of a way. Lines found on a plat and representing the boundaries of a part of the subdivisions it was intended to exhibit are to be taken to mean something, and are not to be regarded as having been used without a purpose. The lines upon this plat so clearly indicate a way that the only doubt that can possibly arise is as to its character, whether it is a public or a private one, for, to affirm that a way of some kind is not designated, is to affirm that the lines marking the boundaries of the strip were used without a purpose, and this would be an affirmation involving a palpable violation of logical rules and legal principles. The reasonable presumption is, that a way, appropriately designated by lines drawn from point to point, which appears upon a plat executed for the purpose of being placed upon record as exhibiting an addition to a city, is a public way, unless, indeed, there is something in the plat

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itself exhibiting a contrary intention. There is nothing in the plat of 1863 manifesting an intention to make the way a private one, and, as there is no indication of a purpose to make the way anything else than a public highway, the presumption from the execution of the plat professing to show an addition to the city should be that the way was dedicated to public purposes. It has been held over and over again that marking highways on a plat of an addition to a town or city and selling lots with reference to them constitute a dedication. *Faust v. City of Huntington*, 91 Ind. 493; *Conner v. President, etc.*, 1 Blackf. 43; *City of Evansville v. Page*, 23 Ind. 525; *City of Logansport v. Dunn*, 8 Ind. 378; *Doe v. President, etc.*, 7 Ind. 641; 2 Dillon Munic. Corp. (3d ed.), sec. 640.

The purpose for which this plat was made and the manner in which it is prepared indicate, at least presumptively, that the ways marked on it are public and not private ways. In *Hanson v. Eastman*, 21 Minn. 509, the plat showed a triangular piece of ground not numbered as a lot, nor designated as a street, alley, park or public square, and it was held that it evidenced a dedication of the ground for public purposes, and that the construction of the plat was a matter of law for the court. The plat executed by the land-owner in the case of *Yates v. Judd*, 18 Wis. 118, designated lots by numbers, but left a space not so designated, and represented it by curved lines corresponding to the bend of a stream, and it was held to import a dedication to the public. In *Sanborn v. Chicago, etc., R. W. Co.*, 16 Wis. 19, some of the streets were named and designated, and lots numbered, but the particular parcel of ground was not described as a street, and yet the court held that an inspection of the plat showed that there was a dedication to the public.

If it be conceded that the face of the plat of 1863 leaves it uncertain whether the way was laid out as a public or private one, then resort should be had to the conduct of the owners to determine the true character of the way. The pub-

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lic were permitted to use the entire way from 1866 without let or hindrance, and prior to that time the only barrier was a gate swung across the south end of the strip of land. Public improvements were made with reference to the way as a public street, and lots were sold with reference to it as a street. The street designated on the plat made by the commissioners in December, 1868, and approved by the parties, showed a continuation of the way as Highland street. A building was erected fronting upon it as a public thoroughfare. In the remonstrance filed against improving it, the grantors of the appellees, as remonstrants, described it as a street, and did not question the right of the city to improve it, but protested against the character of the improvement. The strip was never offered for sale, and no taxes were ever paid on it by the proprietors. Some of these facts exert a peculiarly important bearing upon the question here in dispute. The plat of 1868 in express terms designates the continuation of the way as Highland street, and such an act the Supreme Court of Wisconsin held sufficient to outweigh the figures placed on the plat, and to make it perfectly obvious that it was the intention that the street should be continued as of the same width throughout. *Sanborn v. Chicago, etc., R. W. Co., supra.*

The immunity from taxation is attributable to the fact that the community and the owners regarded it as a public highway, and, for that reason, not taxable. The conveyance of lots bounded on a public way conveys the fee to the grantee to the center of the street. *Terre Haute, etc., R. R. Co. v. Rodel*, 89 Ind. 128; S. C., 46 Am. R. 164; 2 Dillon Mun. Corp. (3d ed.), p. 632, auth. n. Such a conveyance vests in the grantee a right as an abutter of which the State itself can not divest him, except upon the payment of just compensation assessed according to law. *State v. Berdette*, 73 Ind. 185 (38 Am. R. 117); *Common Council, etc., v. Croas*, 7 Ind. 9; *Haynes v. Thomas*, 7 Ind. 38; *Tate v. Ohio, etc., R. R. Co.*, 7 Ind. 479; *Protzman v. Indianapolis, etc., R. R. Co.*, 9 Ind. 467;

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Cummins v. City of Seymour, 79 Ind. 491, *vide* p. 498 (41 Am. R. 618); *Ross v. Thompson*, 78 Ind. 90, *vide* p. 94.

The sale of lots implies that the purchaser shall have the use of the street as a street, and his rights are not confined to the space immediately in front of the ground bought by him, but extend to the street as it appears upon the plat. It would be of little benefit to the purchaser to confine his rights to the narrow limits of the street immediately adjoining his lot, and the law does not circumscribe it within such narrow bounds. Little good would it do a purchaser to have an open street directly in front of him but blocked on either side. The law goes much beyond our statement, for it entitles the owner to all the streets and ways as such laid out upon the plat by which he purchases. So runs the great current of judicial opinion. *Rowan v. Town of Portland*, 8 B. Mon. 232; *Trustees of Augusta v. Perkins*, 8 B. Mon. 207; *City of Winona v. Huff*, 11 Minn. 119; *Huber v. Gazley*, 18 Ohio, 18; *Town of Derby v. Alling*, 40 Conn. 410; *Moale v. Mayor, etc.*, 5 Md. 314. This principle is recognized in *City of Logansport v. Dunn*, 8 Ind. 378, and in *City of Evansville v. Evans*, 37 Ind. 229, *vide* p. 236.

In addition to these important facts, all tending to strengthen the presumption created by the plat, that the strip was dedicated to public purposes, there is the express and unequivocal recognition of the way as a street in the remonstrance addressed to the municipal legislature. If we should apply to this case the rule which applies in ordinary contracts, even where there has been neither such express representations, nor such strong implication from conduct as there is here, and should also treat the plat as ambiguous, we should be compelled to declare that the plat evidences a dedication, for it is a settled rule that where parties by their conduct and acts have given a construction to contracts, the courts will adopt it as the true construction. *Willcuts v. Northwestern M. L. Ins. Co.*, 81 Ind. 300; *Reissner v. Oxley*, 80 Ind. 580;

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Johnson v. Gibson, 78 Ind. 282; *Aimen v. Hardin*, 60 Ind. 119; *Vinton v. Baldwin*, 95 Ind. 433, *vide* p. 436.

We fully agree with counsel for the appellees that an essential element of dedication is the intent of the owner to devote his land to a public purpose, and we unhesitatingly affirm that without such an intention it is impossible that there should be a valid dedication. *President, etc., v. City of Indianapolis*, 12 Ind. 620; *Mansur v. State*, 60 Ind. 357; *Bidinger v. Bishop*, 76 Ind. 244; 2 Dillon Munic. Corp. (3d ed.), section 636. But the intention to which courts give heed is not an intention hidden in the mind of the land-owner, but an intention manifested by his acts. It is the intention which finds expression in conduct, and not that which is secreted in the heart of the owner, that the law regards. Acts indicate the intention, and upon the intention clearly expressed by open acts and visible conduct the public and individual citizens may act. Nor is it to mere secret agreements or arrangements unknown to public officers and to purchasers of lots that courts are to look. What they do look to, and what good conscience and fair dealing require they should regard, is the conduct of the land-owner; that is open to the scrutiny and knowledge of the community and its members. In speaking of a similar question we said: "If a land-owner, by open and visible acts, unequivocally indicates to the public and to citizens that he intended to, and did, throw open a street to the public, and the citizens and public have acted upon the faith that there was a dedication, the law will treat the acts of the owner as constituting an irrevocable dedication." *Faust v. City of Huntington, supra*. In *Gwynn v. Homan*, 15 Ind. 201, it was said, in speaking of a dedication, that: "Such fact may be shown by proof of acts on the part of the owner, such as selling lots on opposite sides of a strip of ground suitable for a street or highway, and standing by and seeing it used by the public as such; or standing by and permitting such user, for a time, and under circumstances, evidencing a dedication." The court said in

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City of Columbus v. Dahn, 36 Ind. 330, that "We think that the question, whether a person intends to make a dedication of ground to the public for a street or other purpose, must be determined from his acts and statements explanatory thereof, in connection with all the circumstances that surround and throw light upon the subject, and not from what he may subsequently testify as to his real intent in relation to the matter. And this is on the principle that the public have a right to suppose that a man intends what his outward conduct and statements indicate, inasmuch as they can not discover his intention in any other manner. Men, in all the affairs of life, are presumed to intend what is fairly and clearly indicated by their acts and conduct; and where the rights of the public or third parties are concerned they have a right to act upon such presumption." A strongly illustrative case is that of *Lamar County v. Clements*, 49 Texas, 347, where it was said: "But where the dedication is clearly manifested by unequivocal acts or declarations, upon which the public, or those interested in such dedications, have acted, the fact that the owner may have entertained a different intention from that manifested by his acts or declarations, is of no consequence." In the case of *City of Denver v. Clements*, 3 Col. 484, the court said: "If there exist an actual intent to reserve any portion of the lands so platted into streets, otherwise than by express reservation on the plat, certainly it should be made manifest in some manner not only of equal certainty, but of equal publicity as the plat, otherwise an actual intent can not be permitted to prevail against an intent on which the law will and must insist, as being shown by unequivocal acts upon which the public had a right to rely." We refer to the following authorities as supporting our position, regretting the lack of space and time to comment upon them. *Barraclough v. Johnson*, 8 Ad. & E. 99, see opinions of LITLEDALE and COLERIDGE, JJ.; *Elizabethtown, etc., R. R. Co. v. Combs*, 10 Bush (Ky.) 382; *Noyes v. Ward*, 19 Conn. 250; *City of Denver v. Clements*, *supra*; *Gamble v.*

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City of St. Louis, 12 Mo. 617; 1 Addison Torts, sec. 302; *Morgan v. Railroad Co.*, 96 U. S. 716.

The intention to dedicate is here inferable from the conduct of the land-owners, and is unequivocally manifested by their open conduct, upon which the citizens and the public had a right to rely, and the secret intention or the private agreement of the owners among themselves, that the way should be a private one, can not prevail against the force of the conduct and acts upon which the public and the citizens relied.

An intention to dedicate may be rebutted in cases where an implied dedication is relied on, but where there is an express dedication, evidenced by a properly executed and recorded plat, upon which the public and the purchasers of lots have acted, the intention can not be rebutted and acquired rights overthrown. *City of Denver v. Clements*, *supra*. If we should treat the case as one of express dedication by the plat, then this proposition would effectually dispose of this branch of the case.

If we treat the case as one of implied dedication, the intention to dedicate, so clearly manifested by the acts and conduct to which we have referred, is not rebutted. Swinging a gate across a way is an appropriate method of giving notice that the way is a private and not a public one, and in many, perhaps in most, cases of implied dedication such an act would be sufficient to rebut an intention to dedicate. 2 Smith's Leading Cases, 147. But where, as here, the facts clearly and unequivocally show an intention to dedicate, and show rights justly acquired by third persons and the public, upon the faith that the land was dedicated for a highway, such an act will not defeat the dedication; it will be treated as a mere temporary use of the highway, and not as a divestiture of the rights of the public, or as an announcement of an intention to maintain a private and not a public way. *Boyer v. State*, 16 Ind. 451.

The gate was, as the special finding shows, abandoned in 1866, and in 1869 another was swung across the way north of

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Market street. Since that time the public has used the way as a street, private rights were acquired on the faith that it was a street, public improvements were made on the faith that it was a street, conveyances were made recognizing it as a street, and in the remonstrance addressed to the common council in 1878 the existence of the street was deliberately and unequivocally affirmed. These facts are of controlling importance, and fully authorize the conclusion that even if there was no street in existence prior to the year 1866, there has been one in existence from that time. These facts show, with great force and clearness, that the owners of the fee created the easement, and that the public accepted it, so that going no further back than 1866, and leaving out of consideration the important occurrences of preceding years, there are facts abundantly sufficient to establish a dedication to the public. It does not require any specific period of user to constitute a valid dedication. We have in our own reports very many cases in which a user, with the knowledge of the owner, for a much shorter period of time than that which elapsed between the year 1866 and the assertion of a claim in this case, was held to make an effectual dedication. In the case which counsel for the appellees cite as favorable to their view, it was said: "The use of land for a highway for such length of time that public accommodation and private rights might be materially affected by an interruption of the enjoyment, is sufficient to raise a presumption that the owner intended a dedication to the public." *Bidinger v. Bishop*, 76 Ind. 244.

This statement of the rule is quite as favorable to the appellees as any that can be found in our reports, and yet it is sufficient to decide the point against them. Stronger cases than the present are found in our reports, and yet the ruling has invariably been in favor of the public. *Carr v. Kolb*, 99 Ind. 53; *Faust v. City of Huntington*, *supra*; *Green v. Elliott*, 86 Ind. 53; *Ross v. Thompson*, 78 Ind. 90; *Summers v. State*, 51 Ind 201; *Holcraft v. King*, 25 Ind. 352; *Fisher v. Hobbs*, 42 Ind. 276; *City of Evansville v. Evans*,

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37 Ind. 229; *State v. Hill*, 10 Ind. 219; *Hays v. State*, 8 Ind. 425. The facts show, with convincing force, that the owners of the land assented to the use of the strip of ground as a public street and that they not only assented to the acquisition of private rights with reference to it as a street, but they themselves created these rights. In no case could assent be more clearly shown even though we reckon the time of the public user from 1866, and give no heed to what occurred anterior to that date.

A private way can not be transformed into a public highway by user by the public, no matter how long continued. A private way, notwithstanding a general use by the community, remains as the donor intended to dedicate it at the time it was laid out, unless he assents to its transformation into a public highway. While the way can not be changed by an unilateral act it may be changed if the public and the land-owner unite in assenting to the change. It is unreasonable to assert that the owner of the fee may not change the easement from a private to a public one where all others interested concur in his acts. The question here is, not whether the public may without the assent of the owners change the character of the servitude, but whether such a change may be made where the owner assents. We think it perfectly clear that, granting (but by no means deciding) that the way was originally a mere private easement, it has been for many years treated by all the interested parties as a street of the city, and the conduct and acts of the owners of the fee have been such as to supply the clearest and most satisfactory proof of assent.

What we have said disposes of all of the questions arising on the facts, and also disposes of the merits of the case as to all the interests involved except those of Catharine Miller. It is asserted by her counsel that the fact that she became a *feme covert* in October, 1868, prevents the acquisition of any easement in her lands. We understand counsel to base their argument upon the general doctrine that a married woman

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can not convey her land, except in cases in which her husband joins in the deed, and that she could not, prior to the act of 1881, lose title to her land by an estoppel *in pais*. This statement of the general rule is correct, and if this case is governed by that rule then the second conclusion of law, as far as it concerns the rights originally vested in Mrs. Miller, may be sustained, but in our judgment this case is not governed by that general rule. There are several reasons which very satisfactorily support this conclusion.

The plat of 1863 was fully confirmed by that of 1868, and conceding the former to be ambiguous as regards the character of the way, that ambiguity was removed by the latter and the acts subsequently done under both plats. This we say because the suit for partition was commenced by Mrs. Miller before her marriage, and the proceedings were confirmed by her after marriage. The proceedings in partition were not discontinued by her marriage, and the decree rendered in that suit related back to the commencement of the proceedings, and bound all interests acquired after the suit was instituted. This proposition rests upon the familiar doctrine that parties and privies who acquire rights while a suit is pending are concluded by the judgment pronounced. The estoppel worked by the judgment rendered on the petition of the guardian in 1863, and the judgment rendered on the petition of Mrs. Miller and her brother Dorman and sister Susan, in 1868, is an estoppel by judgment, and we suppose that no lawyer doubts that the estoppel of a judgment operates upon a *feme covert*. The fact that the plaintiff in a partition suit is an infant does not affect the validity of the decree, for partition may be enforced by, or against, persons under age. *Schee v. McQuilken*, 59 Ind. 269; *Richards v. Richards*, 17 Ind. 636; Freeman Cotenancy and Partition, sec. 457. As the court had jurisdiction of the parties and the subject-matter, its decree would repel a collateral attack even though erroneous, but the case here is stronger than a case of that char-

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acter, for there is nothing showing that the decree was erroneous.

A married woman may by her acts give construction to a contract where there is a doubt as to its effect, and where there is a mistake in the description of the property conveyed it may be corrected, notwithstanding her opposition. *Hamar v. Medsker*, 60 Ind. 413; *Carper v. Munger*, 62 Ind. 481; *Wilson v. Stewart*, 63 Ind. 294; *Styers v. Robbins*, 76 Ind. 547.

If a court may compel parties to make a contract justly express their intention in this respect, there is no reason why their own acts done under it may not be treated as giving to it a just construction and effect. We are not unmindful of the rule, existing prior to the recent statutes, that a married woman is not bound by an executory contract, but while recognizing that rule, we deny its applicability here, for the plain and adequate reason that the dedication here was executed prior to marriage and subsequently confirmed.

A dedication of land need not be evidenced by a written conveyance. A text-writer says: "There is no necessity for a grant or conveyance by deed or writing on the part of the owner of land in order to constitute a dedication." Herman Estop., section 520; Reed Stat. of Frauds, 752. Our cases and our statutes deny the authority of a wife to convey lands except by deed in which her husband joins, and if a deed was essential to constitute a dedication, then the decision upon this point must be for Mrs. Miller; but, as no deed is required, it can not be said that the statute or the decisions close the dispute. It has been decided that a married woman may execute a lease where a writing is not essential to its validity, and the principle upon which these decisions rest is the same as that which governs this case. *Pearcy v. Henley*, 82 Ind. 129; *Nash v. Berkmeir*, 83 Ind. 536. The principle to be deduced from these decisions is, that where a written instrument is essential to convey an interest in the land of a wife, then,

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in order to give it efficacy, both husband and wife must join in executing it. This principle has been applied to dedications in a case much weaker than the present. The case to which we refer is that of *Schenley v. Commonwealth*, 36 Pa. St. 29, wherein it was said: "But it is not to be maintained, that a married woman may not dedicate her land for a public highway. Joining with her husband, she may convey, and, therefore, a dedication, which is but a limited conveyance, may be presumed against her and her husband."

A dedication is in many essential respects different from a conveyance, and some of these differences appear in what has been already said, and it remains to notice some of the others. A dedication does not take the fee from the owner, it simply adds an easement, which, in many instances, as in this, becomes, as it is important to keep in mind, an appurtenant to the estate. A dedication by the husband alone bars the inchoate rights of the wife in his lands. *Duncan v. City of Terre Haute*, 85 Ind. 104; 2 Dillon Munic. Corp. (3d ed.), section 594. Upon the principle which governs in cases like that cited, it is held that in proceedings to condemn land the rights of the wife are barred although she is not a party to the proceedings. 2 Dillon Munic. Corp., *supra*. These are essential things and they very clearly show that a dedication differs very materially from an ordinary conveyance. But in the present instance it appears that the highway was appurtenant to the land of the owner, and the court can not refuse to take notice of the fact that such appurtenances add to the value of land, and are really for its betterment. It is so obvious that town lots not accessible by streets would be of little value that courts can not refuse to take judicial notice of the fact. Town lots shut off from streets and unprovided with means of ingress and egress would be so inaccessible and so isolated as to be of comparatively little value. Our law gives to a married woman the full benefit of her separate estate "as fully as if she was unmarried." 1 R. S. 1876, p. 550. *Pearcy*

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v. *Henley, supra*. If this be true—and that it is, the plain words of the statute, which we have quoted, incontestably prove—then it would seem to follow that executed contracts made for its improvement or betterment are valid. At common law a wife could make even executory contracts concerning the improvement of her separate property enforceable in equity. Kelly Contracts of Married Women, 185, auth. n. 3; 2 Bishop Law of Married Women, sections 201, 202. Our decisions, not, however, without much wavering, are that she can not bind herself by an executory contract, but these decisions do not govern such a case as this, for here the act was fully executed. The question is not what she may agree to do, but whether she may undo what has been fully consummated and upon the faith of which third persons have acquired rights of property. The controlling question is, may she do an act not requiring a written conveyance for the betterment of her separate property? Suppose, for the sake of illustration, that a married woman builds a mill on her own land, and, over other lots owned by her, lays out a highway which affords the means of access to the mill and renders it beneficial to her and gives it value, and that the public improves this strip and she conveys to others lots bounded on the highway, and suppose further, that she afterwards sells the mill, is it not clear that it would be beyond her power to undo what she had done, revoke the dedication, impair the value of the lots sold by her, and destroy the value of the mill property by cutting off all means of access? In such case it is quite clear that the highway would be deemed an appurtenance and would pass with the grant of the mill. We have seen no case that intimates that a married woman who conveys property does not also convey all appurtenances. Where a highway is created as an appurtenance to land, that appurtenance passes with the sale of the land. Washburn Easements, 35; *Ross v. Thompson, supra*, and cases cited. That is the case here; the street was made an appurtenance for the

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betterment of the lots platted by the duly authorized representatives of Mrs. Miller, acting under the order of the court, and lots were conveyed by deeds, in which her husband united, with reference to this street. The conveyances, as we have already demonstrated, did more than pass a right to the street in front of the lots sold, for they passed a right to the use of the street, as a street, from end to end as designated on the plats by which the lots were bought and sold. All the cases agree, that the sale and conveyance of a lot bounded by a highway conveys the fee to the center of the way, and an interest in the highway, as such, throughout its whole length. When the conveyances were made to the purchasers of lots on Highland street the purchaser of each lot acquired the fee in front of his lot to the center of the street, and his deed also conveyed, as appurtenant to the principal thing granted, a right to enjoy an easement in the street as a street. We are clearly of the opinion that the second conclusion of law was wrong as to all of the appellees.

Much stress is placed upon a statement contained in one of the specifications of the special finding that the street south of Market street was never dedicated to the public. But this is a mere conclusion of law improperly blended with matters of fact, and can not govern the facts. Courts always act upon the facts found and never upon mere conclusions of law wrongly cast into the special finding. *Dixon v. Duke*, 85 Ind. 434; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Anderson v. Donnell*, 66 Ind. 150.

Judgment reversed, with instructions to restate the second conclusion of law, and to render judgment upon the whole finding in favor of the appellant.

Filed Dec. 30, 1884; petition for a rehearing overruled June 27, 1885.

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No. 12,200.

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PROSECUTING ATTORNEY.—*Residence.*—*Judicial Circuit.*—*Constitutional Law.*
—Under sections 9 and 11 of article 7 of the Constitution of this State, of 1851, the prosecuting attorney, like the judge of each judicial circuit, is required to reside within his circuit.

SAME.—*Judicial Circuits.*—*Legislative Power and Discretion.*—*Constitutional Restriction.*—The General Assembly has the power, in its discretion, to divide a judicial circuit at any time during the terms of office of the judge and prosecuting attorney of such circuit, subject only to the restrictions that the Legislature can not, by any legislation, abridge the official terms of either of such officers, nor deprive either of them of a judicial circuit, wherein he may serve out the constitutional term for which he was elected. Section 5 of the act of February 25th, 1885 (Acts 1885, p. 29), in so far as it relates to the office of prosecuting attorney, is unconstitutional and void.

From the Montgomery Circuit Court.

E. C. Snyder, A. B. Anderson and *F. M. Howard*, for appellant.

J. M. Seller and *C. Johnston*, for appellee.

Howk, J.—This was an information in the nature of a *quo warranto*, filed by the appellant's relator, Howard, against the appellee, Johnston. The appellee demurred to the information, upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court, and this ruling is the only error assigned here by the appellant's relator.

In his information the relator alleged that, at the general election in November, 1884, he was duly elected prosecuting attorney of the Twenty-second Judicial Circuit of this State, then composed of the counties of Montgomery and Parke; that, at the time of his election to such office, the relator was and had since continued to be a practicing lawyer, duly admitted to practice in all of the courts of this State, and was then and since had been a resident citizen and qualified voter of the State, and, in all respects, eligible to such office; that,

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on the 18th day of November, 1884, the relator was duly commissioned by the governor of the State as such prosecuting attorney, and on the same day he duly qualified as such officer by filing his official bond and taking the oath of office, as required by law, and entered upon the discharge of his official duties as the prosecuting attorney of such judicial circuit; that, at the time of his election and qualification as aforesaid, the relator was a resident of Parke county, and had since continued to reside therein; and that he was competent, ready and willing, and in all respects qualified to perform the duties of the prosecuting attorney of the Twenty-second Judicial Circuit.

And the relator averred that by virtue of an act of the General Assembly of this State, approved February 25th, 1885, the county of Montgomery was constituted the Twenty-second Judicial Circuit, and the county of Parke and the county of Vermillion were constituted the Forty-seventh Judicial Circuit; that, under the provisions of the last mentioned act, the governor of the State had appointed and commissioned the appellee Johnston as the prosecuting attorney of the Twenty-second Judicial Circuit, as thereby constituted; that, on the 2d day of March, 1885, the appellee had duly qualified as such prosecuting attorney by filing his official bond and taking the oath of office, as required by law; that, on the day last named, the appellee Johnston usurped and intruded into, and had since exercised and unlawfully held, the office of prosecuting attorney of the Twenty-second Judicial Circuit, and had thereby interfered with, hindered and prevented the relator Howard in or from exercising the functions of his office in such judicial circuit. Wherefore, etc.

It will be readily seen from the facts stated in the relator's information, that it proceeds upon the theory, that in so far as it affects the relator the recent act of February 25th, 1885, (Acts 1885, p. 28), mentioned in the information, is as to him unconstitutional, inoperative and void. The case has been orally argued before us, with much ability and learning on both sides,

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and, in the course of the argument, one fact was admitted by the counsel of the respective parties, which ought to have been but was not alleged in the information, and which seems to us to be of fundamental value and importance in the proper decision of the matters in controversy between the relator and the appellee. The fact thus admitted, which is shown to be true by the records of the office of the secretary of state, of which records we take judicial notice, is that John W. Conley, Esq., who was elected at the general election in November, 1884, to the office of prosecuting attorney of the Twenty-first Judicial Circuit, as it existed then and until the taking effect of the aforesaid act of February 25th, 1885, and was commissioned and qualified as such for the term of two years from and after the 17th day of November, 1884, was at the time of such election, since has been and now is, a resident of the county of Vermillion. In determining the questions in controversy in this cause we shall consider and decide such questions as if such admitted fact had been, as it ought to have been, alleged in the relator's information.

The act of the General Assembly of February 25th, 1885, which has given rise to this suit, is entitled "An act creating and defining the Twenty-first, Twenty-second and Forty-seventh Judicial Circuits of the State of Indiana, and fixing the length of terms and time of holding the terms of court therein, and providing for the appointment of a judge for the Forty-seventh Judicial Circuit, for the appointment of a prosecuting attorney for the Twenty-first Judicial Circuit, for the appointment of a prosecuting attorney for the Twenty-second Judicial Circuit, and other matters connected therewith, and repealing all laws in conflict, and declaring an emergency."

Section 1 of this act provides that the Twenty-first Judicial Circuit shall be composed of the counties of Fountain and Warren, and fixes the terms of court and their length in each county.

Section 2 declares that the Twenty-second Judicial Circuit

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shall be composed of the county of Montgomery, and fixes the terms of court and their length in such county.

Section 3 provides that the Forty-seventh Judicial Circuit shall be composed of the counties of Vermillion and Parke, and fixes the terms of court and their length in each county.

Section 4 provides for the return of process, etc., and for other matters made necessary by the passage of the act.

Section 5 reads as follows: "It shall be the duty of the Governor, immediately after the taking effect of this act, or as soon thereafter as practicable, to appoint and commission a judge for the Forty-seventh Judicial Circuit as constituted by this act; also, to appoint and commission, as soon as practicable after the taking effect of this act, a prosecuting attorney for the Twenty-first Judicial Circuit as constituted by this act; also, a prosecuting attorney for the Twenty-second Judicial Circuit as constituted by this act, who shall hold their offices until the next general election thereafter, and until their successors shall have been elected and qualified."

Section 6 repeals all laws and parts of laws in conflict with this act.

And section 7 declares an emergency, and that this act shall take effect and be in force from and after its passage.

Prior to the taking effect of this act, the counties named therein, since March 6th, 1873, constituted two judicial circuits; the counties of Vermillion, Fountain and Warren composing the Twenty-first Judicial Circuit, and the counties of Parke and Montgomery constituting the Twenty-second Judicial Circuit. By the above entitled act of February 25th, 1885, the county of Vermillion was taken out of the Twenty-first Judicial Circuit, as it previously existed, and the county of Parke was taken out of the Twenty-second Judicial Circuit, as it theretofore existed, and these two counties, Vermillion and Parke, were constituted the new Forty-seventh Judicial Circuit.

We come now to the consideration of the several questions presented by the record of this cause and the arguments of

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counsel for our decision. In section 9 of article 7 of the State Constitution of 1851 (section 169, R. S. 1881), it is declared and ordained as follows: "The State shall, from time to time, be divided into judicial circuits; and a judge for each circuit shall be elected by the voters thereof. He shall reside within the circuit, and shall hold his office for the term of six years, if he so long behave well."

In section 11 of article 7 of the Constitution of 1851 (section 171, R. S. 1881), it is thus ordained: "There shall be elected, in each judicial circuit, by the voters thereof, a prosecuting attorney, who shall hold his office for two years."

It is not claimed by the relator's counsel, as we understand their arguments, that the General Assembly exceeded their constitutional powers in subdividing the Twenty-first and Twenty-second Judicial Circuits, as they previously existed, in such manner as to create and establish, out of their territory, three judicial circuits instead of the two, as is done in the above entitled act of February 25th, 1885. In so far as the mere creation of the three judicial circuits is concerned, the act under consideration is, beyond doubt, a constitutional and valid law. In the early case of *Stocking v. State*, 7 Ind. 326, the point was made that, under section 9 of article 7 of the State Constitution, the subdivision of the State into judicial circuits could be made only every six years, and that no division could be made, nor new circuits created, at any intermediate time. On this point the court said: "There is nothing in the section itself requiring such a construction. The words 'from time to time' do not import any particular period. Certainly these words will admit, and the common sense of the case would seem to require, that the Legislature might create new circuits 'from time to time,' as in their opinion the exigencies of business might require." Upon the same subject, in *Clare v. State*, 68 Ind. 17, the court said: "The formation or creation of judicial circuits by legislation, and the repeal of such legislation or its amendment, are matters wholly within the discretion and power of the General As-

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ssembly. Of course, the Legislature can not, by any legislation, abridge the constitutional term of office of an elected circuit judge," nor, we may add, of an elected prosecuting attorney, as applicable to the case in hand. *Moser v. Long*, 64 Ind. 189.

It is insisted on behalf of the relator, that notwithstanding the above entitled act of February 25th, 1885, he still is, and will continue to be until the expiration of the term for which he was elected, the prosecuting attorney of the Montgomery Circuit Court, because, as he says, residence in the judicial circuit is not a constitutional requisite or qualification for his election to, or his tenure of, the office of prosecuting attorney. We recognize the rule that where the Constitution prescribes the qualifications of an officer, the Legislature can not add to or detract from such qualifications, unless the power so to do is expressly conferred in the Constitution. *Feibleman v. State, ex rel.*, 98 Ind. 516, and cases cited. This rule does not seem to us, however, to be applicable here. Construing together sections 9 and 11 of article 7 of our State Constitution, the only sections relating to the elected officers of judicial circuits, we think it must be said that, under these sections, the prosecuting attorney, like the judge, must reside within the circuit for which he is elected.

The General Assembly had the undoubted power, in its discretion, to divide the Twenty-second Judicial Circuit, as it had existed for almost twelve years, during the terms of office of the judge and the prosecuting attorney thereof, subject only to the restriction that the law making such division, should provide circuits in which each of such officers might serve out the constitutional term for which he had been elected. In so far as the judge is concerned, who resides in Montgomery county, the act under consideration makes such provision, and that far forth is a constitutional and valid law. But as to the relator, the prosecuting attorney of the old circuit, the act provides no circuit. By reason of the fact that

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both he and Mr. Conley, the prosecuting attorney of the Twenty-first Judicial Circuit, as it existed prior to February 25th, 1885, reside within the limits of the Forty-seventh Judicial Circuit as now constituted, the act under consideration provides no circuit for either of them.

Under the Constitution a prosecuting attorney is an officer of a judicial circuit. During his term of office his circuit may be changed, it is true; it may be enlarged or diminished. But it is not in the power of the General Assembly to legislate him out of a circuit. Where, therefore, as in this case, the law changing his circuit fails to provide the prosecuting attorney with a circuit, it must be that such law, as to him, is inoperative and void, and that notwithstanding such law, and precisely as if it had never been enacted, he is and will continue to be the prosecuting attorney of the circuit for which he was elected, in all the courts of the counties composing such circuit during the remainder of his term.

We are of opinion, therefore, that section 5 above quoted of the act under consideration, in so far as it relates to the office of prosecuting attorney, is unconstitutional, inoperative and void, and that by reason of the failure of the act to provide a circuit for either the relator or Conley, no vacancy existed or can exist in the office of prosecuting attorney in any of the three circuits named in such act until the expiration of the respective terms of office of the relator and Conley. The General Assembly can not create a vacancy in office by any ordinary legislation. They may create an office, and, if it is without an incumbent, a vacancy will exist of necessity, to be filled by the appointing power until the next general election. In *Stocking v. State, supra*, the court said: "We lay no stress on the declaration of the Legislature that there was a vacancy in the office of circuit judge of the new circuit. If there was a vacancy, it existed independent of that declaration. If there was no vacancy, that body could not create one by a declaratory enactment. The vacancy flowed as a natural consequence of their doing what they had a right to

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do—to create a new circuit. * * An existing office, without an incumbent, is vacant, whether it be a new or an old one.” We need hardly add that at the expiration of the terms of office of the relator and Conley, vacancies will exist in the office of prosecuting attorney in each of the three circuits named in the aforesaid act, to be filled at the next general election.

Our conclusion is that the court erred in sustaining appellee’s demurrer to the relator’s information.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrer to the information, and for further proceedings not inconsistent with this opinion.

Filed March 21, 1885.

 No. 11,614.

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SPECIAL FINDING.—*Motion to Make More Specific.*—*Additional Findings.*—*Venire de Novo.*—*Appeal.*—*Supreme Court.*—*Practice.*—Where an appeal is taken to the Supreme Court, and the judgment is reversed upon the appellant’s exceptions to conclusions of law drawn from special findings, to which findings the adverse party made no objection, the latter can not, upon the remanding of the cause to the trial court, obtain the benefit of a new trial indirectly by a motion to make the findings more specific, and for leave to introduce further evidence upon matters in regard to which additional findings were sought, nor is he entitled to a *venire de novo*.

SAME.—*Leaving Issue Undetermined.*—Where a special finding of facts leaves some issue undetermined, such issue will be regarded as not proved by the party having the burden of proof.

SAME.—*Motion for New Trial.*—If there is evidence of a fact which the court ought to have found, but did not, the remedy is by a motion for a new trial on the ground that the finding is contrary to the evidence.

SAME.—*Supreme Court.*—*Presumption.*—Where the evidence is not in the record, the Supreme Court will presume that all the facts proved on the trial were found by the court in its special finding.

ASSIGNMENT OF ERROR.—*Joint Assignment.*—*Practice.*—A joint assignment

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135	356

101	230
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139	35

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143	437

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170	314
170	315

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of error presents no question upon any ruling against one party individually.

PARTITION.—Mortgage Lien.—Judgment.—Where partition is made of land upon which there is a purchase-money mortgage, the parties take their respective interests subject to it, without any declaration in the judgment to that effect.

SAME.—Widow.—Interest in Land Alienated by Husband.—Improvements by Alienee.—In a proceeding by a widow to have her interest in land, alienated by her husband alone, set apart to her, such interest is to be determined by the value of the land at the time of partition, excluding all the increased value from the improvements actually made by the alienee, and leaving the widow the benefit of any increase of value arising from circumstances unconnected with such improvements.

SAME.—Exception to Confirmation of Report of Commissioners.—Practice.—A mere exception to the confirmation of the report of commissioners in partition presents no question as to their duty in making allowance for improvements.

From the Hamilton Circuit Court.

D. Moss, R. R. Stephenson, H. A. Lee, R. Graham and A. C. Harris, for appellants.

F. M. Trissal, for appellee.

BICKNELL, C. C.—Catharine Brenner brought this suit against the appellants, claiming the undivided one-third of certain real estate of which her deceased husband, Conrad M. Brenner, had been seized during their coverture. There was a special finding of facts by the court, with conclusions of law. There was no objection to the finding, but the plaintiff excepted to the conclusions of law. Judgment was rendered upon the finding in favor of the defendants. The plaintiff appealed.

This court held on the appeal that the plaintiff took her interest in the land in controversy, not as the heir of her husband, but in virtue of her connubial rights under section 27 of the statute of descents of 1852, her husband not having been seized of the land at the time of his death, although seized during the coverture, and she not having joined in the alienation of it.

This court also held that the plaintiff's cause of action did

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not accrue until the death of her husband, in 1875, and therefore was not barred by the statute of limitations, either of twenty years or ten years, the suit having been commenced on the 15th of September, 1881. Ordinarily, in such a case, the judgment is reversed, with instructions to state conclusions of law in conformity with the reversing opinion, and to render judgment in accordance therewith, but in this case there was a simple reversal at the costs of the appellees. *Brenner v. Quick*, 88 Ind. 546.

After the cause was returned to the court below, and after the opinion of this court was spread upon the record, the defendants moved the court for a more specific finding of the facts, and for leave to introduce evidence to enable the court to make a further finding supplementary to its special finding. This motion was overruled by the court. The defendants then moved for a *venire de novo*, and this motion was overruled. The court then, upon plaintiff's motion, rendered a judgment for the plaintiff in accordance with the opinion of the Supreme Court, declaring that the plaintiff was the owner of the undivided one-third of the land in controversy, and was entitled to partition, and appointing commissioners of partition, and directing them to set off to the defendant Quick, for his two-thirds of the one hundred and sixty acres described in the complaint, and to the defendant Anderson, for his two-thirds of the eighty acres described in the complaint, the parts of said tracts on which the improvements were situated, if that could be done without injury to the interest of the plaintiff.

The defendant Quick moved to modify this judgment so that the commissioners of partition should be directed not to allow the plaintiff any benefit or advantage of the improvements made by him on the one hundred and sixty acres aforesaid, but to set off to her the value of one-third of said tract less the value of said improvements, and to set off to the plaintiff, if partition can be made thereby, her one-third part in the unimproved land. The defendant Anderson made a like

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motion to modify the judgment in the same manner in reference to the partition of the eighty acres aforesaid. These motions were overruled.

Said defendants then made a joint motion to modify said judgment by adding thereto the following: "And said plaintiff shall hold the lands that may be set off to her, subject to one-third part of the mortgage debt mentioned in the findings of the court." This motion was overruled by the court.

Afterwards the commissioners of partition made a report that they had assigned to the plaintiff fifty and two-thirds acres of said one hundred and sixty acres on the west side thereof, and to the defendant Quick one hundred and nine and one-third acres on the east side thereof, and to the plaintiff twenty-five acres on the east side of said eighty acres, and to the defendant Anderson fifty-four and two-thirds acres on the west side thereof, and that, as far as possible without injury to the interests of the plaintiff, they had assigned to the defendants that part of said land on which the buildings and orchards stood, and had given them the benefit of all the improvements that could be given them without injury to the interests of the plaintiff. On plaintiff's motion this report was confirmed; the defendants excepted to the confirmation of the report. The court then rendered a final judgment of partition, and the defendants appealed.

The appellants make a joint assignment of errors as follows:

1. The court erred in directing that the commissioners, in making partition of the lands, should set off to the plaintiff one-third in severalty in value at the time of such decree and partition, whereas it should have been one-third at the time of its alienation by the husband through the sheriff's sale and deed; and in overruling the motions of defendants to modify the decree so as to provide that she should have no benefit or advantage from or of the improvements made by the appellants as found by the special findings.

2. The court erred in refusing to order and decree that she should have and take her (appellee's) portion of said lands

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subject to one-third part and portion of the mortgage purchase-money debt on said lands, mentioned and described in the special findings, and to modify the decree accordingly, as moved by the appellants.

3. The court erred in charging the appellants with the value of the uses and rents had and enjoyed by them prior to the death of appellant's husband, in January, 1875, and in refusing to hear evidence to amend the special findings and decree so as to declare and provide that in no event should they be charged with any portion of such uses and rents, except so much as accrued after such death, as set forth in their joint motion therefor.

4. The court erred in overruling the joint motion of appellants for a *venire de novo*.

5. The court erred in awarding to appellee the one-third part in value of said lands as they now are, including the improvements made by appellants before the death of her husband, and in confirming the report of such commissioners so made accordingly, and in confirming said report and decreeing accordingly.

The special finding showed that the land in controversy belonged to Adam Brenner, who, in 1854, executed a mortgage thereof to one Boston to secure purchase-money, and afterwards, in 1855, married Catharine Brenner, the appellee; that in 1857 Boston brought a suit upon his mortgage and obtained a decree of foreclosure, and bought in the land at a foreclosure sale; that, in 1858, he conveyed the land to Quick, who, in 1859, conveyed eighty acres thereof to the defendant Anderson; that Quick and Anderson took possession in 1859, the land being then uncleared and unproductive; that Anderson had his eighty acres cleared and under fence in 1863, and that Quick began to clear his one hundred and sixty acres in 1860; that the value of Quick's improvements is \$5,100; that the value of Anderson's improvements is \$650; that Anderson has paid for taxes \$120, and Quick \$240; that the total value of the taxes and improvements is \$6,110, and

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that Quick and Anderson have received rents from said lands in all amounting to \$6,630, of which Quick has received \$4,590, and Anderson \$2,040; that Brenner died on January 7th, 1875, leaving the plaintiff as his widow; that this suit was commenced on September 15th, 1881; that neither Brenner nor the plaintiff ever resided in Indiana; that said foreclosure suit was commenced by publication, and that the affidavit on which the publication was made contained only a statement that the defendant was a non-resident, without any averment that a cause of action existed against him, or that he was a necessary party to the suit.

Some of the questions sought to be raised are not presented by the record.

After the cause had been taken to this court on appeal, without any objection by defendants to the special findings, and after the judgment had been reversed on the plaintiff's exceptions to the conclusions of law, and the cause had been remanded to the court below, the defendants could not obtain the benefit of a new trial indirectly, by their motion to make the findings more specific and for leave to introduce further evidence, upon the matters in regard to which additional findings were sought; and they were not entitled to a *venire de novo*.

The well established rule in reference to such special findings is, that if the facts found leave some of the issues undetermined, such issues must be regarded as not proved by the party having the burden of proof. *Ex Parte Walls*, 73 Ind. 95; *Talburt v. Berkshire L. Ins. Co.*, 80 Ind. 434.

If the special finding is silent as to any material fact which the defendant had the burden of proving, such silence is equivalent to a finding against the defendant as to that fact. If there was evidence of such fact, and if the court ought to have found it, the remedy is a motion for a new trial on the ground that the finding is contrary to the evidence. Such omission to find a fact that might have been found is no ground for a *venire de novo* in such a case, and when, as in

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the present case, the evidence is not in the record, this court will presume that all the facts proved on the trial were found by the court in its special finding. *Graham v. State, ex rel.*, 66 Ind. 386; *Vannoy v. Duprez*, 72 Ind. 26; *Martin v. Cauble*, 72 Ind. 67; *Stropes v. Board, etc.*, 72 Ind. 42. The defendants had lost their remedy as to any supposed deficiency in the special findings.

This disposes of the fourth specification of the assignment of errors, and of all that part of the third specification which alleges error in the refusal of the court to hear further evidence as to the rents and profits, for the purpose of making more specific special findings.

The appellants assign errors jointly. A joint assignment presents no question upon any ruling against one only of the parties. *Robbins v. Magee*, 96 Ind. 174; *Jones v. Custor*, 96 Ind. 307; *Lake v. Lake*, 99 Ind. 339.

The appellants Quick and Anderson made separate motions to modify the judgment. Each moved for a modification to the effect that the commissioners of partition should not allow the plaintiff any benefit of improvements on the land claimed by him, and should set off to her one-third of such tract less the value of such improvements. Any error of the court in the rulings upon these separate motions is not presented by the joint assignment of errors. *Boyd v. Pfeifer*, 95 Ind. 599, and the cases there cited.

The appellants also made a joint motion to modify the judgment by adding thereto the following: "And said plaintiff shall hold the lands that may be set off to her, subject to one-third part of the mortgage debt mentioned in the findings of the court." Error in the overruling of this motion is properly presented in the second specification of the assignment of errors. But the mortgage never having been foreclosed, it still remains a lien upon the mortgaged premises, and there was no error in refusing to add to the judgment a declaration of its legal effect. The plaintiff will hold her share of the land subject to the lien of the mortgage debt,

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and that lien may be foreclosed by anybody who is entitled to be subrogated to the rights of the mortgagee, in a proper proceeding for that purpose. The declaration, proposed to be added to the judgment, would have made no change in the rights of any of the parties.

The first specification of error charges that the court erred in directing the commissioners to set off to the plaintiff one-third in value of the lands at the time of the decree and partition; whereas, it should have been one-third at the time of its alienation by the husband.

But if the value of the lands was increased by the growth and settlement of the surrounding country, or by any other circumstances unconnected with the improvements on the lands, the widow was entitled to that increase of value.

In *Smith v. Addleman*, 5 Blackf. 406, this court reversed a judgment because dower was assigned according to the value at the time of alienation, and held that it should have been according to the value at the time of the assignment. The court said: "The American decisions have not been uniform on this subject, but they preponderate in favor of making 'the value of the land at the time of the assignment, excluding all the increased value from the improvements actually made upon the premises by the alienee' the criterion by which to adjudge dower, 'leaving the dowress the full benefit of any increase of value arising from circumstances unconnected with those improvements.' Such was the conclusion of Mr. Justice STORY, after a very able and learned review of the American and English authorities, in the case of *Powell et ux. v. M. & B. M. Co.*, 3 Mason, 347. This doctrine has also the sanction of Chancellor Kent, 4 Kent Com. 68, and may be considered as settled law." The court, therefore, did not err in refusing to direct partition according to the value of the land at the time of its alienation by the plaintiff's husband.

The fifth specification of the assignment of errors charges that the court erred in awarding the appellee one-third of the

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value of said lands as they now are, including the improvements made by the appellants before the death of the appellee's husband, and in confirming the report of the commissioners so made and decreeing accordingly.

This question as to improvements is the same which the appellants undertook to present by their separate motions to modify the judgment; they took no benefit by those motions because their assignment of errors was joint.

There is nothing else in the record which can be supposed to warrant the fifth specification of error, unless it be the appellants' exception to the confirmation of the report.

In cases of this kind, however, a claim for such improvements is properly made by cross-petition (*Martindale v. Alexander*, 26 Ind. 104), and such cross-petition ought to be filed before the judgment of partition, and before the appointment of the commissioners, in order that the rights of the parties may be adjusted and the duty of the commissioners clearly pointed out. *Stafford v. Nutt*, 35 Ind. 93.

In the present case there was no such cross-petition for improvements; there was no claim for any allowance for improvements. The appellants seem to have relied on their general denial and special defences of the statute of limitations, and although, in their special defences, it is averred that improvements were made of the value of \$5,000, this is pleaded merely in bar. It would seem that the appellants relied on the statute of limitations as a complete bar to the action, and, therefore, when the report of the commissioners came, instead of moving to set the report aside or vacate it, and showing the grounds of such motion, they merely excepted to the confirmation of the report.

In *Lucas v. Peters*, 45 Ind. 313, 318, this court said: "The report of the commissioners is to be regarded in the light of a verdict of a jury rendered upon a trial at law; and it should be disturbed or interfered with by the court only upon grounds similar to those on which a verdict would be set aside,

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and a new trial granted." Therefore, a mere exception to the confirmation of the report of the commissioners amounts to nothing.

In *Clark v. Stephenson*, 73 Ind. 489, the appellants, as in the present case, assigned as error the confirmation of the commissioners' report without any bill of exceptions. This court said: "If the objection be to the report, or to the conduct of the commissioners, the proper practice is to move to set aside or to vacate the report, * * and, if the ruling of the court be adverse, to save the exception by a bill of exceptions, showing the motion, the grounds of objection, the proofs made, if any, and the action of the court; and, in this court, the error should be assigned directly on that action, just as upon a ruling on a demurrer."

In the present case there was no motion to set aside or vacate the report; there was nothing but an exception to the confirmation of the report. The question, therefore, whether the commissioners' report ought to have undertaken to make any special allowance to the appellants for improvements is not presented in this record. See *Kern v. Maginniss*, 55 Ind. 459; *Randles v. Randles*, 63 Ind. 93; *Griffy v. Enders*, 60 Ind. 23; *Radcliff v. Radford*, 96 Ind. 482, 487.

But, even if it were properly before us, the appellant, not having objected to the special findings, can not now avail himself of any deficiency in those findings in regard to improvements. The only matter in the findings which states anything specifically as to improvements, except as to the clearing of the land, is that the defendant Quick has made lasting and valuable improvements on said land as follows:

Buildings	\$1,200.00
Ditching	1,200.00
Fencing	1,500.00
Orchard	300.00
Clearing	900.00
<hr/>	
Total	\$5,100.00

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And that the defendant Anderson's improvements are :

Ditching	\$ 50.00
Fencing	200.00
Clearing	400.00

Total	\$650.00
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And that they have received rents, as follows :

Defendant Quick has received	\$4,590.00
Defendant Anderson has received	2,040.00

Total	\$6,630.00
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And that they have paid for taxes, as follows :

Defendant Quick has paid	\$240.00
Defendant Anderson has paid	120.00

These findings show that the appellants have paid out for taxes and improvements \$6,110, and have received in rents \$6,630, or \$520 more than their outlay. Perhaps the court below regarded the rents as a fair compensation for the improvements. The court decreed to the appellee one-third part of the lands, and directed the commissioners of partition to set off to the appellants for their shares of their respective tracts, those parts of such tracts on which the buildings and orchards stood, and to give them the benefit of all the improvements that could be given them without injury to the interests of the plaintiff. We think that, upon the foregoing finding as to improvements, no more favorable decree for the appellants could have been made. There is nothing in the finding which shows the date of the improvements, nor what specific parts thereof were made before, and what parts were made after, the death of the plaintiff's husband, except as to the single item of clearing, and there is no statement of the rents received yearly.

The evidence not being in the record, the presumption is that the finding contains all the facts proved at the trial. *Graham v. State, ex rel., supra.* The appellants ought to have shown the facts necessary to enable the court to make the ruling

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they sought as to the improvements. If they did show such facts, then the findings were open to the objection that they were contrary to the evidence. But the appellants, having made no objection to the findings, can not now claim that they are entitled to the same decree to which they would have been entitled if the findings had set forth the facts on which alone such decree could have been made.

Upon the findings the judgment of the court was right. There is no available error in the record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed April 8, 1885.

 No. 12,210.

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149	408

INTOXICATING LIQUOR.—*Sale to Minor.*—*Evidence.*—Under section 2094, prohibiting the sale of intoxicating liquors to minors, the charge will be sustained by proof of a sale directly or indirectly.

SAME.—*Belief as to Age of Minor.*—Where the seller believes, and has good reason to believe, at the time of the sale, that the minor is an adult, he is not guilty of the offence prescribed by the statute.

SAME.—*Evidence.*—*Instruction.*—In such case, the defendant has a right to show such matters in defence, and the trial court has no right to assume and charge the jury that the offence is complete without regard to such evidence.

INSTRUCTION.—*Stating Elements of Offence.*—When it is undertaken to state all the elements of an offence upon the evidence before the jury, the instruction should be so constructed as not to practically withdraw from the jury competent and material evidence.

From the Warren Circuit Court.

J. McCabe and E. F. McCabe, for appellant.

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F. T. Hord, Attorney General, *W. B. Hord* and *J. G. Pearson*, for the State.

ZOLLARS, C. J.—Appellant was indicted and convicted under section 2094, R. S. 1881, which provides that whoever directly or indirectly sells, barter or gives away any intoxicating liquors to any person under twenty-one years of age shall be fined.

The prosecuting witness testified that in June, 1884, he went into appellant's saloon and bought of him a glass of lager beer, for which he paid five cents; that he was then under twenty-one years of age; that he had been shaving and had a beard on his face.

The appellant testified that at the time mentioned the prosecuting witness Frame, with whom he was but slightly acquainted, came into his saloon in company with George Minor; that Minor called for two glasses of beer; that appellant asked Frame if he was of age, and he answered that he was; that Minor also said that he knew Frame was of age; that appellant then set out two glasses of beer, and received payment from Minor, and that Minor and Frame drank the beer.

This court will not settle the conflict and reverse the judgment upon the weight of the evidence. The indictment charges a sale of liquor to a minor. The court did not err in instructing that the charge will be sustained by proof of a sale directly or indirectly. The sale itself is not the important thing. The purpose of the statute is to prevent minors from getting and using, and thus becoming habitual users, of intoxicating liquors. Whether the sale be direct or indirect, it is still a sale.

In the fourth instruction the court charged the jury as follows: "If Martin Frame and one George Minor together entered defendant's saloon, and George Minor called for lager beer for both, and the defendant, knowing that the liquor was to be drunk by both Minor and Frame, set out two glasses of

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beer upon the counter, and Minor and Frame both drank the same, and Minor paid for such liquor, such a transaction would be an indirect sale to Martin Frame; and if said Frame was under the age of twenty-one years, the defendant would be guilty of the offence charged."

This instruction we think is erroneous. It is meant, of course, to apply to the testimony of the defendant, in case the jury should conclude to act upon it, and reject the testimony of the prosecuting witness. It charges, in so many words, that if certain facts testified to by the defendant were true, they constituted the complete offence charged in the indictment, and the jury should convict him. When it is thus undertaken to state all of the elements of an offence upon the evidence before the jury, the instruction should be so constructed as not to practically withdraw from the jury competent and material evidence. It was shown that Frame had a beard upon his face. The defendant testified that he was but slightly acquainted with Frame, and that both he and Minor declared that he was over twenty-one years of age. All of this was practically withdrawn from the jury by the instruction in which they were charged that the defendant would be guilty upon the other facts, without any regard to these.

Under the settled rule in this State, if the defendant believed, and had good reasons to believe, that Frame was an adult, he was not guilty of the crime for which he was prosecuted, even though he sold him liquor, and even though he was a minor. *Rineman v. State*, 24 Ind. 80; *Farbach v. State*, 24 Ind. 77; *Brown v. State*, 24 Ind. 113; *State v. Kalb*, 14 Ind. 403; *Robinius v. State*, 63 Ind. 235; *Moore v. State*, 65 Ind. 382.

Appellant had the right to show in defence that he had good reasons to believe, and did believe, that Frame was of age. This he attempted to do. Whether or not he succeeded was a question for the jury, and the court had no right to assume and charge that the offence was complete without regard to

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his evidence upon that point. *Pittsburgh, etc., R. W. Co. v. Wright*, 80 Ind. 236; *Growcock v. Hall*, 82 Ind. 202.

For this error the judgment must be reversed. Other objections to the instruction are discussed, but as they may not be material upon a second trial we need not decide anything in relation to them.

Judgment reversed.

Filed April 4, 1885.

No. 11,731.

FIRST NATIONAL BANK OF INDIANAPOLIS v. ARMSTRONG.

GARNISHEE.—*Liability of.*—A garnishee, from the time of the service of the summons upon him, is accountable to the plaintiff in the action for the amount of money, property or credits in his hands, or due and owing from him to the defendant.

SAME.—*Conversion of Securities after Summons.*—Where a bank, summoned as garnishee, after the service of summons, converts and disposes of collateral securities held by it, the burden is upon it to account to the plaintiff and to show that it has properly discharged its duty as custodian of such securities.

From the Marion Superior Court.

T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels, F. Knefler and J. S. Berryhill, for appellant.

B. Harrison, W. H. H. Miller, J. B. Elam, C. Byfield and L. Howland, for appellee.

NIBLACK, J.—On the 3d day of October, 1881, John Armstrong, the appellee, filed his complaint in the court below against one Henry Ocorr, and commenced proceedings in attachment under the complaint against Ocorr's property, for money alleged to be due upon a promissory note. On the 10th day of the same month proceedings in garnishment were commenced against the First National Bank of Indianapolis, the appellant in this cause, requiring it to answer as to prop-

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erty charged to be in its possession belonging to Ocorr, and a summons was served on the bank the day following.

The bank answered, admitting that it had in its possession a note secured by mortgage, transferred to it by Ocorr, but averring that the note had been assigned to it as collateral security for an indebtedness due from the Henry Ocorr Manufacturing Company, and that the note was not of greater value than such indebtedness, and hence denying that it had in its possession any property belonging to Ocorr.

The attachment proceedings against Ocorr were sustained, and Armstrong obtained judgment against him for \$7,280.87.

At a trial between Armstrong and the bank, as garnishee defendant, the court below at special term made a finding that the bank was liable to Armstrong in the sum of \$6,463.27, and rendered a judgment accordingly, which was affirmed in general term.

We regard the following as a fair synopsis of the facts upon which this latter judgment rests. Ocorr was the founder, principal stockholder and chief promoter of a manufacturing company doing business in the city of Indianapolis, known as the "Henry Ocorr Manufacturing Company." In the summer of 1881, the company having become financially embarrassed, and it being desirable that some new arrangement should be made for its more successful management, Ocorr entered into negotiations with one Nathaniel T. Wordin, of Bridgeport, Connecticut, for the sale to him of a large proportion of the shares of stock in the company, and, on the 5th day of September following, closed the negotiations by a consummation of the proposed sale. Ocorr took in payment a note executed by a firm known as Liebrum Brothers to Wordin, and endorsed by him, for \$18,000, less a credit of \$1,000, and secured by a mortgage on real estate in Bridgeport. Either immediately, or within a few days thereafter, Ocorr transferred this note to the bank as collateral security for something more than \$12,000 which the company owed that institution. Ocorr also executed a power of attorney to

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the president of the bank, authorizing him to sell the note and apply the proceeds to the payment of the debt due to the bank, and the discharge of other indebtedness. About the middle of September, 1881, the president of the bank visited Bridgeport for the purpose of selling the note, but was unable to obtain an offer for it which he felt authorized to accept, and upon inquiries made while in Bridgeport, he became satisfied that not more than \$12,000 could probably be realized upon the note, either by its sale or a foreclosure of the mortgage given to secure it. Soon after the president's return from Bridgeport, the bank took judgment against the manufacturing company for \$12,292.72, the amount for which the note in question was really held as collateral security. At the time this Liebrum note was delivered to the bank it held, and when this last named judgment was rendered in its favor it continued to hold, the individual notes of the appellee Armstrong, and of Hazelrigg, Wheeler, and possibly others, also stockholders in the company for the aggregate amount of about \$6,000 as collateral security for the same indebtedness which the Liebrum note was transferred to it to secure. On the 5th day of November, 1881, a receiver was appointed for the manufacturing company, who took charge of its assets and of its business.

Wordin, being desirous of regaining the possession and ownership of the Liebrum note, paid the bank the sum of \$12,000, and, on the 25th day of November, 1881, received from it an assignment of its judgment against the manufacturing company, as well as of the Liebrum note and other notes, held as collateral security for the payment of that judgment.

Afterwards Wordin, upon a compromise with the makers, received on the notes, other than the Liebrum note, assigned to him as above, the sum of \$3,000, and from the receiver of the company, as a dividend due upon the judgment obtained by the bank, the further sum of \$3,750. There was evidence tending to prove that the Liebrum note was of the probable

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value of \$12,000, and, estimating its value at that sum, Wordin realized on the securities he obtained from the bank the aggregate sum of \$18,750. This was \$6,457.28 in excess of the amount of the judgment assigned to him by the bank, and, allowing for some differences in accrued interest, was doubtless the basis of the court's finding in the proceedings against the appellant.

Section 931, R. S. 1881, provides for making third parties garnishee defendants in attachment proceedings, and for the issuance and service of summons upon such parties.

Section 932, next following, declares that "From the day of the service of the summons, the garnishee shall be accountable to the plaintiff in the action for the amount of money, property, or credits in his hands, or due and owing from him to the defendant."

Waples on Attachment, at page 293, says of a garnishee: "If he really owes the defendant or holds his property, he should say so in his answer; and he is then bound to hold what he has for account of whom it may concern. He can not change property, convert it into money, or play the owner, but must consider himself as the keeper, just as though appointed such by the sheriff or the marshal in the case of the ordinary seizure of personal property." On page 295, it is further said: "He can not voluntarily divest himself and deliver the property to the defendant. He must hold the goods from the owner, from a purchaser, from every claimant. Even when forcibly divested, he will be presumed responsible for the forthcoming of the property when required; and the *onus* will be upon him to show that he did his full duty as custodian." That author recognizes some exceptions to this rule, as where the usages of business or the best interests of the parties concerned shall so require, property may be converted into money and the proceeds held subject to the final order of the court having jurisdiction of the original action, but the general rule is as stated, and both

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it and the exceptions are in harmony with the provisions of section 932 of the statute herein above set out.

Drake on Attachments, in commenting upon the general liability of a garnishee after summons has been served upon him, states as a conclusion, that "It should also be distinguished from the case of a liability existing, but uncertain as to amount, at the time of the garnishment, but which afterward becomes, as to the amount, certain. There the garnishment will attach, and the extent of the garnishee's liability will be determined by the subsequent ascertainment of the amount due. Such was a case where an insurance company was summoned as garnishee, in respect of an amount due the defendant for a loss of property insured by the company, which happened before but was not adjusted until after the garnishment; and the company was held liable." See section 669; see, also, *Kneeland Attachment*, 410, section 478, and *Simpson v. Potter*, 18 Ind. 429; *Hite v. Fisher*, 76 Ind. 231. Counsel for the appellant, conceding that their client was liable for the conversion of all the securities held by it in excess of the amount necessary to discharge its judgment against the manufacturing company, nevertheless argue that it can not be fairly inferred from the facts, as we have given them, that these securities were of greater value than the amount of the judgment at the time they were transferred to Wordin. But this argument impresses us as not fully meeting the case which the facts made against the appellant. By the statute, it was made *accountable* to the appellee for everything in its possession in which Ocorr had an interest, whether reversionary or otherwise, at the time the summons was served upon it. The facts clearly established a conversion by the appellant of all the collaterals held by it, and this threw upon it the burden of *accounting* to the appellee and of showing that it had properly discharged its duty as custodian of these collaterals. In the absence of such a showing, we think the court below was justified in assuming that the notes, so converted by the appellant, were worth what Wordin had

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realized upon a part of them, and was presumably able to realize upon what still remained in his hands.

The judgment is affirmed with costs.

Filed April 8, 1885.

No. 11,986.

LANDON ET AL. v. WHITE.

ASSIGNMENT OF ERROR.—*Clerical Error.*—*Supreme Court.*—A mere clerical mistake in an assignment of error, such as the use of one word for another, will not preclude the Supreme Court from considering and deciding the precise question which was manifestly intended to be presented thereby.

PLEADING.—*Written Instrument.*—*Copy.*—*Demurrer.*—When a pleading is founded on a written instrument, under section 362, R. S. 1881, the original instrument or a copy thereof must be filed with such pleading, or it will be held bad on a demurrer thereto for the want of sufficient facts.

CHATTEL MORTGAGE.—*Foreclosure.*—*Deficiency.*—*Waiver.*—*Payment.*—*Semble,* that a mortgagee of chattels, to secure a personal claim against the mortgagor for any balance of the mortgage debt after the sale of the mortgaged chattels, must foreclose his mortgage and sell such chattels under the decree of court; that, by selling in any other way, he will waive all claim for any such deficiency, and that his taking and retaining possession of such chattels, without foreclosure of his mortgage and sale under the decree, will constitute payment of the mortgage debt.

From the Warren Circuit Court.

J. McCabe and *E. F. McCabe*, for appellants.

C. V. McAdams, for appellee.

Howk, J.—This was a suit by the appellee, as the payee, against the appellants, as the makers, of a promissory note. The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, and over the appellants' motion for a new trial the court rendered judgment on the verdict.

The first error of which complaint is made by the appellants in this court is assigned as follows: "That the Warren Circuit Court erred in sustaining the demurrer to the first paragraph of *appellee's* answer."

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137	157
101	249
144	314
144	430
101	249
152	26
101	249
170	573

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After quoting this assignment of error, the appellee's counsel says: "It is at once apparent that no question is presented by the first assignment of error, as the sustaining of a demurrer to a pleading filed by the *appellee* can not be questioned by the appellant, as it is a ruling in his favor." It would be very unfair, however, as it seems to us, if we should hold that no question was presented by the first assignment of error, upon the ground or for the reason suggested by appellee's counsel. The use of the word *appellee*, instead of the word *appellant* in the first assignment of error, is so palpably a mere clerical error that we would not notice it if appellee's counsel had not insisted that, because of such clerical misprision, no question was presented for our decision by the first alleged error. Mere clerical mistakes, such as the use of one word for another, where, as in this case, we can not possibly be mistaken in regard to which one of two words was intended to be used in an assignment of error, will not preclude us, in any case, from considering and deciding the precise question which the appellant manifestly intended to present thereby. So, in the case in hand, the mere clerical mistake of appellants' counsel, in writing the word *appellee's* where they should have written the word *appellants'* in the first assignment of error, will not, and certainly ought not, to prevent us from considering and deciding the precise question which was intended to be presented thereby, namely, Whether or not the trial court erred in sustaining the demurrer to the first paragraph of the *appellants'* answer? And, if such ruling was erroneous, whether or not the error is such as authorizes or requires the reversal of the judgment?

In the first paragraph of their answer, the appellants alleged that the sole consideration of the note in suit was the sale to them by the appellee of one span of horses for the price of \$200, which price was evidenced by such note; that at the time of such sale the appellants executed to the appellee, as required by him, a chattel mortgage on such span of horses to secure the payment of the aforesaid note; that such mort-

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gage was duly executed and acknowledged on the day of the date and execution of such note, and was duly recorded in the recorder's office of Warren county, wherein the mortgagors then resided, within less than ten days after its execution; that such mortgage provided, among other things, that the mortgagors should retain and have the possession of the mortgaged property until the breach of any of the conditions therein named, on the part of such mortgagors, and that, upon such breach, the mortgagee should have the right to take immediate possession of the mortgaged property wherever it could be found, unconditionally, as and for his own property, forever; that one of the conditions named in such mortgage was that the mortgagors should promptly pay the note in suit at its maturity, and on their failure so to do then the appellee, as mortgagee, should have the right to take immediate and unconditional possession of such property, wherever it might be found, as his own absolutely, forever; that the note was not paid at maturity, and the appellee as the mortgagee, acting under and by virtue of such mortgage, after the note became due, took possession of the mortgaged property and advertised that at a certain time and place such property would be sold at constable's sale, but such advertisement was not signed by any one; that afterwards, and on the day named in such pretended notice, the appellee as mortgagee made a pretended public sale of the mortgaged property to himself, being both the seller and buyer, and had ever since retained the possession of such property, claiming to be the owner thereof by virtue of the rights conferred on him by such mortgage and pretended sale; that the mortgage contained no stipulation empowering the appellee as mortgagee to sell the mortgaged property; and that the debt, evidenced by the note in suit, was fully discharged and satisfied by the aforesaid taking and retaining possession of such mortgaged property by the appellee as mortgagee. Wherefore, etc.

This paragraph of answer manifestly proceeds upon the theory that a mortgagee of chattels, in order to secure a per-

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sonal claim against the mortgagor for any part of the mortgage debt which may remain unsatisfied after the sale of the mortgaged chattels, must foreclose his mortgage in equity and sell such chattels under the decree of the court; that, by selling in any other way, he waives all claim for any deficiency, and that the mortgagee's taking and retaining possession of the mortgaged chattels, without foreclosure of his mortgage and sale under the decree, will constitute payment of the mortgage debt. Such would seem to be law applicable to such a mortgage as the one in the first paragraph of appellants' answer. Jones Chat. Mort., sections 711 and 773, and cases cited in foot-notes. We do not find it necessary, however, in this case to make any decision touching the merits of the defence attempted to be stated by the appellants in the first paragraph of their answer. It is very clear, we think, that this paragraph of answer is founded upon the chattel mortgage described therein. Under section 362, R. S. 1881, it was necessary to the sufficiency of the first paragraph of answer, that the original chattel mortgage, or a copy thereof should be filed with such paragraph, or that a sufficient excuse should be alleged therein for the failure to file therewith such original written instrument, or a copy thereof. In this case, the appellants did not file either the original chattel mortgage, or a copy thereof, with the first paragraph of their answer, nor did they allege therein any excuse whatever for their failure to file such original instrument, or a copy thereof, with such pleading. We are of opinion, therefore, that the first paragraph of answer was clearly insufficient under the code, and that the demurrer thereto was correctly sustained. This conclusion is fully supported by many decisions of this court. *Brown v. State, ex rel.*, 44 Ind. 222; *Sinker, Davis & Co. v. Fletcher*, 61 Ind. 276; *Anderson School Tp. v. Thompson*, 92 Ind. 556.

The only other error, of which the appellants complain in argument, is the overruling of their demurrer to the second paragraph of appellee's reply to the second paragraph of

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their answer. Substantially the same facts are stated in the second paragraph of answer as were alleged in the first paragraph, the substance of which we have heretofore given in this opinion. The same defect exists in the second paragraph of answer, which we have already held to be fatal to the sufficiency of the first paragraph. The second paragraph, like the first, was founded upon the chattel mortgage described therein, and neither the original mortgage nor a copy thereof was filed with such second paragraph, nor did the appellants allege therein any excuse for their failure to file the original or a copy with such pleading. For this cause, the second paragraph of answer was bad, and therefore it is immaterial whether the court erred or not, in overruling the demurrer to the second reply. Because, even a bad reply is good enough for a bad answer. *Ætna Ins. Co. v. Baker*, 71 Ind. 102.

The judgment is affirmed with costs.

Filed April 1, 1885.

No. 12,004.

BREMMERMAN ET AL. v. JENNINGS ET AL.

FRAUDULENT CONVEYANCE.—*Answer.*—*Deed.*—*Delivery.*—An answer to a complaint to set aside a conveyance alleged to be fraudulent as to creditors, alleging that the deed was drawn up in the name of the debtor as grantee; that it was never delivered; that the grantor intended to make a gift of the land to his daughter, the wife of the debtor, and that at his daughter's solicitation he made another deed conveying the land to her, is good.

SAME.—*Husband and Wife.*—A husband has a right as against creditors to join in a conveyance to a trustee for his wife, in order to correct a mistake and clear up her title.

PRACTICE.—*Reference to Master Commissioner.*—*Exceptions to Report.*—It is not error to permit a party to file additional exceptions to the report of a master commissioner after it is returned into court.

SAME.—*Finding of Master Commissioner.*—*Effect of.*—The finding of the master commissioner does not conclude the court in cases where the evidence is properly reported. In such cases the court may disregard the master's finding and act upon the evidence reported by the master.

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120	253
101	253
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137	473
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101	253
150	482

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DEED.—*Delivery.*—*Acceptance.*—*Recording.*—It is essential to the valid delivery of a deed that it should be accepted by the grantee, and if the deed is beneficial to the grantee and is recorded, an acceptance will be presumed, but this presumption may be rebutted.

PLEADING.—*Practice.*—A plaintiff must recover upon the theory of the case on which his complaint proceeds or he can not recover at all.

EVIDENCE.—*Admissions of Husband.*—The declarations of a husband that he is the owner of land claimed by his wife are admissible upon the question of his credibility as a witness, but they do not bind the wife.

From the Tipton Circuit Court.

S. J. Peelle, W. L. Taylor, G. Shirts and W. R. Fertig, for appellants.

J. Stafford and T. E. Boyd, for appellees.

ELLIOTT, J.—The appellants' complaint alleges that the appellee Joseph L. Jennings was the owner of real estate, of which a description is given, on the 29th day of April, 1876, and on that day became indebted to John Holloway in the sum of four hundred dollars; that before the debt became due the notes evidencing the debt were assigned to the plaintiffs; that on the 8th day of May, 1876, Joseph L. Jennings and his wife Elizabeth J. Jennings conveyed the land to Benjamin Sturdevant, and he on the same day conveyed it to Elizabeth J. Jennings without any consideration, and that both of the conveyances were executed and accepted for the purpose of defrauding the creditors of Joseph L. Jennings. It is also alleged that judgment was obtained upon the notes, and that the debtor had not at the time conveyances were made, nor at the time the action was instituted, sufficient property subject to execution to pay his debts.

The second paragraph of the joint answer of the appellees alleges that Elizabeth J. Jennings is the daughter of Benjamin Sturdevant; that the latter, being desirous of conveying to her, in consideration of love and affection, the land, signed a deed purporting to convey the land to her husband, Joseph L. Jennings, on the 1st day of January, 1868, and caused the same to be recorded; that soon after the signing and record-

ing of the deed, and before it was delivered, the grantor learned that his daughter desired to hold the title to the land herself, and "hence," as the answer states, "the deed was never delivered to Joseph L. Jennings, but remained" in the grantor's possession; that in 1866 the grantor had actually given the land to his daughter, and she had entered into possession of it. The answer also alleges that the deed to the husband was made without the consent of the wife, and the conveyance was finally executed to her for the sole purpose of vesting her with title, and not for the purpose of defrauding the creditors of her husband.

The answer is good. It is sufficient to state one reason for this conclusion, although there are others, and that reason is this: It fully appears that the deed made in 1868 was never delivered to Joseph L. Jennings, and he was, therefore, never the owner of the land, and if not the owner it was not subject to seizure for the payment of his debts, nor could he have made a fraudulent conveyance of it, nor was it fraudulent for him to join in a deed merely clearing up his wife's title and giving her a clear title of record to what was already hers.

The issue joined between the parties was referred to a master commissioner, and he reported a finding favorable to the appellants. Exceptions to the finding were filed before the master, and when the report came into court the appellees were allowed to file additional exceptions. There was no error in permitting these additional exceptions to be filed. The reference to the master did not abridge the power of the court to take such steps as should secure a just result, and it was entirely proper to permit the filing of such exceptions as enabled the parties to present the merits of the controversy for review.

Counsel for appellants are in error in assuming that the finding of the master concluded the court. The ultimate decision of all questions of fact, as well as of law, must be made by the court in chancery cases. The court, to be sure, may adopt the finding of the master, but is not bound to do so.

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Where, as here, the evidence is properly reported, and the correctness of the master's finding is challenged by proper exceptions, the court must review the evidence, and if the finding is erroneous disregard it, and pronounce the proper decision. The report of the master is in its nature advisory, and may be used to assist the court, but not to conclude it. In the trial court, the presumption should be that the finding of the master is correct, but if the trial court adjudges it erroneous the presumption goes down. *McKinney v. Pierce*, 5 Ind. 422.

The act of Sturdevant in placing the deed to Joseph L. Jennings on record worked no estoppel in favor of the appellants. That act did, it is true, make a *prima facie* case in their favor upon the question of delivery, but it did no more, and this *prima facie* case was explained by the evidence. It is essential to the delivery of a deed that there should be an acceptance by the grantee; a delivery does, indeed, import an acceptance, and the evidence here shows no acceptance. It can not be presumed that Joseph L. Jennings accepted the deed, and thus divested the prior rights of his wife, and we know of no rule that will permit his creditors to insist that he shall treat the delivery as valid, to her prejudice and their gain.

The conveyance by the husband to the wife through the medium of her father to clear up her title was not a recognition by the former of the validity of the deed to him. If the wife entered into possession under a gift from her father, although the gift was by parol, she had such a prior right to the land as justified the husband in securing to her a perfect title by removing the appearance of title created by the deed executed to him by the father of his wife. The husband's creditors have no such rights as will force the defeat of the father's purpose to make his daughter a gift and take from her the fruits of her father's bounty.

The complaint does not proceed on the theory that Mrs. Jennings suffered her husband to be held out to the world as

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the owner of the property, and that credit was given him on the faith that he was such owner. The theory of the pleading is that the husband was the owner of the land and conveyed it to his wife for the purpose of defrauding his creditors. It is well settled that a complaint is to be judged from its general scope and tenor, and that it must proceed on a definite theory, and be sufficient on that theory, or it will not be good at all. *Western Union Tel. Co. v. Reed*, 96 Ind. 195, see p. 198; *Cottrell v. Aetna L. Ins. Co.*, 97 Ind. 311; *City of Logansport v. Uhl*, 99 Ind. 531. A plaintiff can succeed upon the case made by his complaint, and not upon a different one; his evidence must prove the substance of the issue tendered by his pleading, or he will fail, no matter what else he may prove. *Hannon v. Hilliard*, *post*, p. 310.

The statement of Joseph L. Jennings that he was the owner of the land could not impair the rights of the wife. Such statements went to the question of his credibility as a witness, but they did not preclude his wife from asserting her ownership of the land. There was no issue made that she had lost her rights by estoppel; the only issue was whether she participated in a fraudulent conveyance, executed for the purpose of defeating the creditors of her husband.

There is certainly no evidence of any fraudulent act on her part, nor of any guilty knowledge of a fraudulent intent on the part of any one else, so that the question was narrowed to this, Was she a mere volunteer? In our opinion the evidence shows that she was not a volunteer, but that she had, if not a legal estate in the land, at least an equitable one, which her husband had a right to join in protecting.

Our conclusion is that there is evidence fairly sustaining the finding of the trial court, and that, under long settled rules, we can not disturb it.

Judgment affirmed.

Filed March 31, 1885.

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Catterlin *et al.* v. Armstrong.

No. 11,533.

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MORTGAGE.—*Indemnity.*—*Foreclosure.*—*Breach of Condition.*—*Pleading.*—

Complaint.—A complaint to foreclose a mortgage to indemnify a surety, containing an agreement to pay the debt and to keep the surety unharmed as such, which assigns for breach a failure to so pay and save the plaintiff unharmed, and averring that the plaintiff was compelled to and did pay, is good without alleging a failure to repay the plaintiff.

SAME.—*Foreclosure.*—*Ownership of Mortgaged Property.*—*Parties.*—*Bankruptcy.*

—*Answer in Bar.*—An answer in bar to a complaint to foreclose a mortgage, that some of the lands were not owned by the defendant, but were and are the property of M. who is not a defendant, is bad on demurrer; so, also, an answer that the mortgagor had been adjudged a bankrupt and discharged after the cause of action accrued.

SAME.—*Statute of Limitations.*—A suit to foreclose a mortgage is not barred by the statute of limitations until the lapse of twenty years.**SAME.**—*Junior Mortgagee.*—*Improvements.*—Where a senior mortgage has been foreclosed without making the junior mortgagee a party, and the land sold under the decree, the junior mortgagee whose mortgage was recorded is not bound to redeem, or offer to do so, but may sue the purchaser to foreclose, and in such case the purchaser can not claim for improvements or taxes paid.**SAME.**—*Marshalling Securities.*—In such case, if the rights of the defendant would require that the securities be marshalled, the complaint being silent as to any facts requiring it, the defendant should by counterclaim allege such facts and pray relief.**PRACTICE.**—*Motion by Defendant to Compel Plaintiff to Enlarge Prayer for Relief.*—A motion by a sole defendant, after issues are formed, to compel the plaintiff to enlarge his prayer for relief, comes too late, and is unwarranted at any time.

From the Clinton Circuit Court.

J. N. Sims, T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker and E. Daniels, for appellants.

J. V. Kent, W. R. Moore and J. W. Merritt, for appellee.

MITCHELL, J.—This cause is here on appeal the second time in substantially the same form. *Catterlin v. Armstrong*, 79 Ind. 514. The questions made before, except as to the statute of limitations, are not now in the record, or are not again presented. It is a proceeding to foreclose an indemnity

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mortgage executed by John W. Blake on certain lands therein described to Armstrong. The appellee had become bound as surety for Blake on certain notes described in the mortgage, which contained in it a stipulation that "said Blake expressly agrees to pay all of the above described notes without any relief whatever from valuation and appraisement laws, and to keep the said Isaac D. Armstrong unharmed as his security."

The breach charged is that "said John W. Blake did not pay the sums of money in said mortgage stated and save said plaintiff unharmed, but that on the contrary said plaintiff was compelled to and did pay all of said sums in full."

After the execution of the Armstrong mortgage, Catterlin became the owner of Blake's interest in the part of the land here involved, by purchase under a decree of foreclosure of a prior mortgage given by Blake to one Kerr; Armstrong was not made a party to the proceedings in the Kerr foreclosure. The complaint is needlessly encumbered with a recital at large of the proceedings to foreclose the Kerr mortgage. All that was material in that connection was to have averred that Catterlin had become, or claimed to be, the owner of Blake's interest in the mortgaged premises, and that he was in possession. How he derived his title was immaterial. If there was any claim that Armstrong's interest in the land had been barred by the Kerr foreclosure, that was matter for Catterlin to have brought forward by answer, and need not have been anticipated in the complaint. All that is said in the complaint, upon the theory which it counts, respecting the Kerr mortgage, and its foreclosure and the sale under it, is of no further consequence than to show that Catterlin was at the time of the commencement of this proceeding the owner of the fee in the land, and that he was in possession.

It is now urged that the court below erred in overruling a demurrer to the complaint, and the point is made that it contains no averment, either directly or inferentially, that the money which the appellee paid as the surety of Blake had not been repaid to him.

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It has been frequently held that good pleading requires that in all actions for breaches of contract for the payment of money, the complaint should either aver a non-payment of the money demanded, or facts from which its non-payment can be fairly inferred. *Wheeler and Wilson M'fg Co. v. Worrall*, 80 Ind. 297; *Higert v. Trustees, etc.*, 53 Ind. 326; *Michael v. Thomas*, 27 Ind. 501; *Kent v. Cantrall*, 44 Ind. 452.

It will be observed, however, that the mortgage sought to be foreclosed in this record is one of indemnity, in which there was written a direct stipulation to pay the several notes on which the appellee was bound as surety, and it has been held that a failure on the part of the mortgagor to pay the debt according to the engagement in the bond or mortgage constitutes such a breach as entitles the mortgagee to foreclose his mortgage at once, even without paying the debt himself. *Gunel v. Cue*, 72 Ind. 34; *Strong v. Taylor School Tp.*, 79 Ind. 208; *Bodkin v. Merit*, 86 Ind. 560.

In all actions to recover money due on promissory notes, or for the breach of contracts by the terms of which money is to be paid to the obligee in the contract, the failure to pay the money to the plaintiff constitutes the breach which gives the right of action, and in all such cases it must be averred that the money is due and remains unpaid; but where a bond or mortgage contains a stipulation that the obligor or mortgagor will pay a sum of money to a third person, and save the obligee or mortgagee harmless, the failure to pay according to the stipulation constitutes the breach, and makes the right of action immediately complete. In such cases, where the stipulation to do the thing, the failure, and that the plaintiff has thereby sustained damage, are averred, the cause of action is sufficiently stated.

If no damage has been sustained, and none is probable, or if having been sustained it has been paid, these are proper matters to be averred and shown in defence. There was no error in overruling the demurrer to the complaint.

The mortgage, a copy of which is embodied in the com-

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plaint, embraces a description of other parcels of land in addition to that owned by the appellant. The prayer of the bill only asked a foreclosure against the appellant's land. After the issues were fully completed, the appellant filed his written motion in which the court is asked to "order the plaintiff to embody in his complaint a description of and prayer for foreclosure of the mortgage mentioned in his complaint, against all the other lands mentioned and described in said mortgage." This motion was overruled by the court, and this ruling, it is argued, was error.

The court having properly held the complaint sufficient, and the case having been put at issue, it is not perceived how the motion could have been sustained. It is not apparent how the court could then have ordered the appellee to insert something more in his complaint, or in the prayer for relief, nor do we discover how the refusal to make the order operated to the injury of the appellant. Under this assignment the doctrine of marshalling securities is adverted to somewhat, and it is said in argument, too, "that if a joint personal surety is sued without the joinder of his co-sureties, and this appears from the face of the complaint, he may demur;" and further, that "the general proposition is familiar that the release of one of several joint debtors is a release of all the others," and the proposition is sustained by authority that a party has no right to split up his cause of action, etc. Conceding all this, we are yet unable to discover how it tends to show that the appellant's motion should have been sustained. The real estate covered by the mortgage was all described in the mortgage, which was copied into the body of the complaint, and it was in no aspect of the case necessary or proper to describe it further. If any of it had been released from the mortgage to the detriment of the appellant, or if for any reason other tracts were or should have been made equally or primarily liable, with or before that owned by appellant, or if, in order to a complete determination of the equities of the whole case, other parties were for

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any reason necessary, all these were matters proper to be brought before the court by the appellant in some appropriate pleading, and, being in a court of equity, the decree would doubtless have been moulded according to the equitable rights of the parties quite regardless of the form of the prayer in the appellee's bill.

The court below sustained demurrers to the fifth, sixth and eighth paragraphs of the appellant's answer, and this ruling is assigned for error.

The fifth paragraph of answer set up, that part of the land against which foreclosure of the mortgage was asked was not at the commencement of the suit owned by the defendant below, but that the same "was then and still is the sole property of one Mary M. Given, who was not a party to the suit."

As no ground was alleged why she should have been made a party, nor was it asked that she should be made a party, it is not perceived how the sustaining of the demurrer injured the appellant.

The sixth paragraph of answer alleges that after the appellee's cause of action accrued on the mortgage, the mortgagor Blake filed his petition asking to be adjudged a bankrupt, and that although the appellee was duly notified of such proceedings, he failed to file and prove his claim against him, and failed to receive any part of the estate of Blake, and that he was duly adjudged and discharged as a bankrupt.

This answer was bad for two reasons: 1. It did not appear that the bankrupt had any estate for distribution; and, 2. The discharge of Blake as a bankrupt in no manner affected the lien of the appellee's mortgage, which was taken before the adjudication was had. *Truitt v. Truitt*, 38 Ind. 16; *Haggerty v. Byrne*, 75 Ind. 499.

The eighth paragraph of answer set up the fifteen years' statute of limitations.

This statute did not apply. The mortgage lien would not be barred until twenty years had elapsed after the cause of

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action accrued. *Catterlin v. Armstrong, supra.* There was no error in the ruling of the court on the answers.

We have examined the points made by counsel as to the admissibility of certain evidence admitted on behalf of appellee and as to the amount of the recovery allowed by the court below. We think the testimony was admissible, and that there is evidence sustaining the finding of the court.

Judgment affirmed, with costs.

Filed Feb. 17, 1885.

ON PETITION FOR A REHEARING.

MITCHELL, C. J.—Since the principal opinion was filed, and in support of the petition before us, learned counsel present an argument, in which great research and ability are manifest, and which is devoted to the discussion of questions neither argued nor, with but one exception, suggested before.

The questions presented, so as to fall within the rule requiring decision, were all considered and decided in the opinion filed. The ruling of the trial court in sustaining the demurrer to the second paragraph of the appellant's cross-bill was merely suggested in the brief filed in the first instance. The court below followed the ruling in *Catterlin v. Armstrong*, 79 Ind. 514, 525, in which the learned commissioner who pronounced the judgment of the court had explicitly determined the question arising thereon, and as no suggestion of disapproval of that case was made in the brief, we were, as counsel seemed to be, content to consider the point at rest.

It is now said that if the decision rendered in this case stands, it is impossible not to see that the appellant must suffer hardship and injustice, and we are pressed with an earnest and able argument to consider reasons adduced and authorities now cited for the first time to prevent the alleged injustice which it is claimed will result from the decision as it now stands.

The complaint in this case shows that a mortgage was executed by Blake to secure a debt owing to Kerr. This mort-

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gage was dated September 23d, 1851. Blake also delivered an indemnity mortgage to Armstrong on the same and other lands on the 17th day of August, 1859. This mortgage, it is agreed, was duly recorded. A decree of foreclosure was rendered on the Kerr mortgage June 28th, 1860, and under this decree a sale was made to Catterlin August 11th, 1860. Armstrong was not made a party to the Kerr foreclosure. Catterlin received a sheriff's deed and went into possession at once, and made improvements.

It is now contended that a junior mortgagee, who has not been made a party to the proceeding, can not foreclose his mortgage against a purchaser in possession under a sale made in pursuance of a decree given on a senior mortgage, without first redeeming or offering to redeem from such sale, and it is insisted that because the bill asking a foreclosure in this case does not allege a redemption or offer to redeem, it was in consequence insufficient on demurrer.

In this connection the cases of *Cain v. Hanna*, 63 Ind. 408, and *Catterlin v. Armstrong*, *supra*, so far as they announce a contrary rule, are subjected to animadversion as infringing well settled principles.

It is also contended that a purchaser in possession under a senior mortgage, who has made valuable improvements on the land, is, as against a junior mortgagee, whose mortgage was duly recorded, but of which such purchaser had no actual notice, entitled to be reimbursed for his improvements.

That the rights of a junior mortgagee, who was not made a party, are in no manner affected by the foreclosure of and sale on a senior mortgage, has been so often determined that this much may now be accepted as settled. As respects him there has been no foreclosure, and he stands in relation to that suit and the sale under it as though they had never occurred. The purchaser at such sale has accomplished nothing more than to acquire and combine the rights and interests of the mortgagor and senior mortgagee. Thenceforth he stands to all intents and purposes in the shoes of both. He has ac-

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quired and could acquire no right as against the junior encumbrancer which before was not possessed by those in whose place he stands. By his deed he acquired the legal title and right of redemption of the mortgagor. Superadded to these, equity maintains the senior mortgage on foot for his benefit. But neither the rights nor remedies of the junior mortgagee have been meanwhile affected or disturbed in the least degree. Whatever may have transpired to which he was not a party has deprived him of nothing, either in respect of right or remedy, which he possessed before. These conclusions are, we think, sound in principle and fully sustained by authority. *Holmes v. Bybee*, 34 Ind. 262; *Murdock v. Ford*, 17 Ind. 52; *Hosford v. Johnson*, 74 Ind. 479; *McKernan v. Neff*, 43 Ind. 503; *Hasselman v. McKernan*, 50 Ind. 441; *Goodall v. Mopley*, 45 Ind. 355; *Gage v. Brewster*, 31 N. Y. 218.

To ascertain what remedies a junior mortgagee may pursue after a foreclosure and sale on a senior mortgage to which he was not a party, it is only necessary to determine what he might have done before. That he might have maintained a suit to foreclose his mortgage, without first redeeming or offering to redeem from the senior mortgagee, can not be disputed. The most a senior mortgagee can do in such case, if he be made a party, is to exhibit his mortgage, either by answer or cross-bill, have it declared the prior lien and the sale decreed subject to it, or he may, in the same case, foreclose the right of both the mortgagor and junior mortgagee to redeem from him. If he can do more than this after a foreclosure of his mortgage and sale, then he has it in his power to deprive the junior encumbrancer of an important and valuable right without giving him a day in court. The right to foreclose his mortgage and expose the mortgaged estate to sale for the purpose of paying both mortgage debts, instead of redeeming from the first, is a valuable right and may be the only one which the junior encumbrancer is in position to avail himself of, and of this he can not be deprived during

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the lifetime of his mortgage except by the judgment or decree of a court duly given. *Coleman v. Witherspoon*, 76 Ind. 285; *Moffitt v. Roche*, 76 Ind. 75. That a second or subsequent mortgagee has the equitable right to redeem the mortgaged estate by paying the prior encumbrance at any time after its maturity, can not affect his independent and concurrent right to foreclose and cut off the equity of redemption of all others who possess that right, and to sell the estate of the mortgagor or those standing in his place for the purpose of paying his debt, even though such sale may have to be made subject to the rights of prior mortgagees.

The precise question here involved was determined by Chancellor WALWORTH, in an elaborate opinion in the case of *Vanderkemp v. Shelton*, 11 Paige, 28. The learned chancellor there said: "In England, the court does not decree a sale of mortgaged premises, but merely allows the second encumbrancer to file a bill to redeem from the first encumbrance, and that the junior encumbrancers may redeem both of the prior ones, or be foreclosed. And the complainant there is, in all cases, required to offer to redeem the first encumbrance. But here, where the *puisne* creditor has the right to a sale of the estate to satisfy his debt, after applying so much of the proceeds of the sale as may be necessary to pay the debt and costs of the prior encumbrancer, he is not required to offer to pay the first encumbrance."

The right of the prior mortgagee, if made a party, is to set up his mortgage and have it adjudged the prior lien, and that it be first paid out of the proceeds of the sale, or if it is due he may by cross action have a decree of foreclosure against all concerned. What was said in *Cain v. Hanna*, *supra*, and *Catterlin v. Armstrong*, *supra*, concerning the right of a junior mortgagee to foreclose his mortgage after a foreclosure of and sale on a senior mortgage to which he was not made a party, is approved.

A purchaser, who obtains title and goes into possession under a sale made on a foreclosure of a senior mortgage, is not en-

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titled to be reimbursed for permanent improvements which he has made, by a junior mortgagee who was not made a party, and whose mortgage was duly recorded at the time of such foreclosure and sale. This was decided when this case was here before. That decision was cited and followed by Woods, J., in *Taylor v. Morgan*, 86 Ind. 295. The point involved was fully considered and determined in the case of *Ritter v. Cost*, 99 Ind. 80, which is in principle analogous. In *Coleman v. Witherspoon*, *supra*, substantially the same question is in judgment.

That a person in possession of real estate under color of title, and who, while so in possession, in good faith makes valuable improvements, will be allowed the benefit of such improvements upon failure of his title, is a salutary provision of the statute. This case, however, does not fall within its protection; no such claim is made. Nor is the contention of the appellant maintainable as a doctrine of equity. The consideration that he had no actual knowledge of the Armstrong mortgage is of no moment. It is admitted that it was of record, and he was, therefore, conclusively charged with notice of it, as also with the rights of the mortgagee under it. He will be presumed to have bid and made the purchase with reference to the junior mortgage, and with respect to the junior mortgagee he became to all intents the mortgagor and equitable assignee of the senior mortgage. He had the clear right by a strict foreclosure to cut off any right of Armstrong under his mortgage, had he chosen to inform himself of the condition of the record. Instead of doing this he made improvements on the property, which under all the authorities became part of it.

It is not averred that he was misled into this by any misrepresentation, concealment or other misconduct of Armstrong. That Armstrong had knowledge of the fact that Catterlin was making improvements on the lot, without more, did not constitute an estoppel against him. In legal contemplation, Catterlin had notice of his mortgage. The improve-

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ments which he made are to be considered as if made by the mortgagor, whose shoes the appellant stands in with respect to the title. *Wharton v. Moore*, 84 N. C. 479 (37 Am. R. 627); *Rice v. Dewey*, 54 Barb. 455. Nor has he any greater right to demand an accounting for taxes paid than the mortgagor himself would have had in case he had remained the owner and in possession. The whole question is covered by the suggestion that as to Armstrong the foreclosure and sale on the Kerr mortgage left him with respect to his rights, remedies and obligations precisely as if it had not occurred.

Concerning the right of Catterlin to require the mortgaged premises to be sold in the inverse order of alienation, no doubt can exist as to the rule, but the record presents no case for its application. The complaint for foreclosure does not disclose whether the other parcels of land embraced in Armstrong's mortgage were sold by Blake or not, or whether they may not have been sold before the appellant's rights attached; nor is anything made to appear showing their value. It was for the appellant to bring the facts upon the record by answer.

The petition for a rehearing is overruled.

Filed June 10, 1885.

No. 12,002.

THE BOARD OF COMMISSIONERS OF FULTON COUNTY v.
MAXWELL.

COUNTY COMMISSIONERS.—*Claims Against County.*—*Exclusive Original Jurisdiction of County Board.*—*Repeal of Act by Implication.*—The act of 1852 (section 5771, R. S. 1881), providing that a claimant might either appeal from the decision of the board of county commissioners disallowing his claim, or bring an original action against the county, was repealed by implication by the act of 1879 (Acts 1879, p. 106), and the only manner in which the circuit court can acquire jurisdiction of such a claim, whatever its nature, is by appeal from a decision of the board.

From the Fulton Circuit Court.

101	268
147	456

101	268
152	508
101	268
162	429

The Board of Commissioners of Fulton County v. Maxwell.

I. Conner, D. Turpie and J. Rowley, for appellant.
M. L. Essick and G. W. Holman, for appellee.

BLACK, C.—The appellee sued the appellant in the Fulton Circuit Court to recover damages for injury to his property caused by the breaking down of a public bridge across a creek, on a highway in said county, in July, 1883, the breaking of the bridge having been occasioned by its defectiveness, through the negligence of the defendant.

It was alleged in the complaint that the plaintiff filed his claim for said injury with the auditor of said county, who presented it to the board of commissioners of said county, and that said board, at its September term, 1883, disallowed said claim and wholly rejected it.

A demurrer to the complaint was overruled. An issue of fact was formed, upon the trial of which there was a verdict for the plaintiff, on which judgment was rendered.

It was assigned in the demurrer, as one of the grounds thereof, that the court had no jurisdiction of the subject of the action. By a statute of 1852 (section 5771, R. S. 1881), it was provided that if a claim were disallowed by the board of county commissioners, in whole or in part, the claimant might appeal, or, at his option, bring an action against the county.

The appellee's claim having been disallowed by the county board, he, proceeding upon the assumption that this statutory provision was still in force, did not appeal from the decision of said board, but brought an original action in the circuit court against the county by its corporate name.

But in 1879 the General Assembly enacted a statute concerning claims against counties, providing for the filing thereof with the county auditor and the presentation thereof by him to the board of county commissioners. The third section of said statute (Acts 1879, p. 106; section 5769, R. S. 1881) provides: "Any person or corporation, feeling aggrieved by any decision of the board of county commissioners, made as

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hereinbefore provided, may appeal to the circuit court of such county, as now provided by law."

The next section of said statute, being section 5760, R. S. 1881, provides: "No court shall have original jurisdiction of any claim against any county in this State, in any manner, except as provided for in this act."

The only court to which original jurisdiction is given by said act is the board of county commissioners. The privilege given by said act of 1852 (section 5771, R. S. 1881) to the claimant, of bringing an original action against the county upon his claim disallowed by the board of county commissioners, instead of appealing from the decision of the board, was repealed by implication by said act of 1879; and the only manner in which the circuit court can acquire jurisdiction of such a claim, whatever its nature, is by appeal from a decision thereon of the board of county commissioners. *Pfaff v. State, ex rel.*, 94 Ind. 529; *State, ex rel., v. Board, etc., ante*, p. 69.

The court, because it had not jurisdiction of the subject of the action, erred in overruling the demurrer to the complaint.

PER CURIAM.—Upon the foregoing opinion the judgment is reversed, at the costs of the appellee, and the cause is remanded, with instructions to sustain the demurrer to the complaint.

Filed April 10, 1885.

No. 12,231.

MASSEY v. JERAULD.

DECEDENTS' ESTATES.—*Sale of Lands.*—*Liens.*—Where, upon an order of court generally to sell lands to make assets for the payment of debts, there is a sale, the purchaser takes title subject to all liens, though he did not give the bond required by statute, R. S. 1881, section 2350, conditioned for their payment.

From the Gibson Circuit Court.

101	270
128	268
101	270
139	170

Massey v. Jerauld.

C. A. Buskirk, for appellant.

T. R. Paxton, for appellee.

FRANKLIN, C.—Appellee held a judgment against one King, who died the owner of certain real estate. Letters of administration were duly issued upon King's estate, under which the administrator sold the deceased's interest in the real estate for the payment of his debts, at which sale the appellant became the purchaser, paid the purchase-money and received a deed from the administrator for the land, subject to the widow's interest. The estate was insolvent, and paid no part of appellee's judgment.

Appellee commenced this suit to have the land declared subject to the lien of his judgment, and sold for the payment thereof.

Appellant answered by a denial and a special paragraph. Appellee replied to the special paragraph by a denial. There was a trial by the court, finding for the plaintiff, and over a motion by the defendant for a new trial, judgment was rendered for appellee.

The only specification of error insisted upon by appellant in his brief is the overruling of his motion for a new trial. The reasons stated for a new trial are, that the finding is contrary to law, and not supported by sufficient evidence. The proceedings to sell the land were had in 1882.

Real estate encumbered by liens may be sold by an administrator in one of two ways: 1st. Subject to the liens; and, 2d. To discharge the liens. In the latter case the purchaser will take and hold the lands freed from the liens. This has long been the statutory law of Indiana. See R. S. 1843, p. 532, section 251; 2 R. S. 1852, p. 264, section 89; 2 R. S. 1876, p. 528, and R. S. 1881, section 2350.

Section 2337, R. S. 1881, in relation to the duties of an administrator in the sale of real estate, provides: "Before filing such petition, he shall carefully examine the offices of the clerk, auditor, treasurer, and recorder in each county in

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• which real estate of the deceased may be situate, and ascertain the exact character and extent of each lien thereon created or suffered by the deceased in his lifetime, and remaining unsatisfied of record."

The 2338th section, among other things, provides: "The holder of every lien on the real estate which the executor or administrator shall have reason to deem invalid or discharged, in whole or in part (except taxes and judgments and mortgages in favor of the State of Indiana), shall be made defendants to every such petition; and may be proceeded against by the name or style by which he or they may be designated in the record or instrument constituting such lien. Any person claiming an interest in or lien upon any of the real estate, may also be made a defendant." The petition shall also set forth "the particulars of each lien, whether general or special, including taxes accrued at the death of the decedent, and judgments and mortgages, due or owing to the State, upon all or any of the decedent's real estate, appearing and remaining unsatisfied of record; with the amount and date of lien and names of the holders, as the same appear of record."

The 2346th section, among other things, provides: "If it be shown on the hearing that the real estate, or any portion thereof, is encumbered by liens, the court shall, in its finding, fix the amount and extent of each lien and the priorities of the several liens. If any debt secured by lien be not due, the court shall fix the amount thereof at its present worth, rebating interest for the unexpired time, unless the real estate be sold subject to the lien."

The 2350th section provides: "If the real estate, or any part thereof, ordered to be sold, shall be encumbered with liens, the court shall, in the order of sale, direct the sale of the real estate to discharge all or any of the liens or subject to all or any of the liens thereon. If sale be made to discharge such liens, the purchaser shall take and hold the real estate freed from such lien, and the lien shall attach to the fund arising from the sale. If the sale be made subject to

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such lien, the purchaser shall execute his bond, payable to such executor or administrator, with penalty and surety to the acceptance of the latter, conditioned that he will pay and discharge the lien, and hold the executor or administrator, and all others interested in the estate, harmless from all damages by reason of such lien and the claims secured thereby. Upon confirmation of such sale, and assignment by the executor or administrator of such bond, without recourse, to the holder of the lien, the estate shall be discharged from the payment of the debt secured by such lien."

According to the foregoing provisions of the statute, the administrator must sell the real estate either subject to the liens, or freed from them by being sold in discharge thereof; and in the latter case the holder of the liens is remitted to the proceeds of the sale.

In the case of *Martin v. Beasley*, 49 Ind. 280, it is said: "When the court orders the sale of real estate by an executor or administrator for the payment of liens thereon, the money may be so applied by the executor or administrator, under the direction of the court. But when the land is sold subject to the liens, the purchaser must pay them himself. There is no warranty in such sales or in the conveyance usually made by an executor or administrator. Unless otherwise ordered by the court, they sell and convey the land subject to all incumbrances." This language is approvingly quoted in the case of *Boaz v. McChesney*, 53 Ind. 193, and is supported by the following cases: *Foltz v. Peters*, 16 Ind. 244; *Clarke v. Henshaw*, 30 Ind. 144; *State, ex rel., v. Kelso*, 94 Ind. 587.

In the case of *Henderson v. Whiting*, 56 Ind. 131, it is said: "The administrator may sell the lands, but the purchaser takes them subject to liens, unless they are sold to pay the liens, which does not appear in this case."

In order then to determine the only question in this case, we must look to the order of the court under which the ad-

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ministrator sold the land. Unless the sale pursuant to this order divests the lien of appellee's judgment, the effect of the administrator's deed is simply to quitclaim to the purchaser the decedent's interest in the land. The notice for the petition stated that the land was to be sold "to make assets for the payment of the debts and liabilities of said estate." The petition alleged that the land was subject to liens for taxes, a mortgage, and a judgment in favor of one Kendle, and simply asked an order to sell.

The court on the hearing found that "the land was liable to be sold to make assets for the payment of the debts of said estate;" that it was subject to the lien of a mortgage in favor of one Woods for \$419.30, of a judgment in favor of Kendle for \$50, and of taxes for \$16.67. And the court decreed that the administrator sell the land and report his doings therein to the court.

Appellee was not made a party to the proceedings to sell; nor was he or his judgment named or referred to in all of said proceedings. The land was sold for the payment of the debts generally, subject to the liens named. The deed is nothing more than a quitclaim deed, and the land remained subject to all the then existing liens. It was not sold to discharge the liens in the order of their priority, and thereby free the lands from all encumbrances; but the purchaser bought it subject to whatever liens were then upon it. The fact that the administrator took no bond from the purchaser to pay off the liens can not divest the liens or affect their validity. *Sparrow v. Kelso*, 92 Ind. 514, and *State, ex rel., v. Kelso, supra*.

The finding of the court is supported by the evidence, and is not contrary to law. There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed April 4, 1885.

Coan v. Elliott.

No. 11,557.

COAN v. ELLIOTT.

701	375
185	537
101	275
136	667
101	275
141	448

REAL ESTATE, ACTION TO RECOVER.—*Sheriff's Sale.*—*Description.*—*Void Deed.*—*Evidence.*—In ejectment, where the defendant shows title by sheriff's sale and deed, to satisfy a judgment against the plaintiff, the land being described therein exactly as in the deed upon which the plaintiff solely relies to show his title, the verdict must be for the defendant, though by reason of insufficient description of the land both deeds be void.

SAME.—*Execution.*—*Sheriff's Return.*—*Appraisement.*—*Evidence.*—Where the sheriff sells land on execution, the appraisement thereof is no part of his return, and if returned it is not even *prima facie* evidence, and if it show no appraisement where that is required, its production is not proof of the fact.

SAME.—*Presumption.*—In ejectment, to show that a sheriff's sale was invalid for want of appraisement, it is necessary to show affirmatively that there was no appraisement, else it will be presumed that the sheriff did his duty.

From the Knox Circuit Court.

J. C. Denny, for appellant.

T. R. Cobb and O. H. Cobb, for appellee.

COLERICK, C.—This action was brought by the appellant to recover the possession of certain real estate. The complaint was in the ordinary form prescribed by the statute in such cases. An answer of general denial was filed. The issues were tried by the court and resulted, over a motion for a new trial, in the rendition of a judgment in favor of the appellee. The only error assigned by the appellant for the reversal of the judgment is the ruling of the court below upon the motion for a new trial.

It appears by the evidence, which is in the record, that Charles Grimes, on the 3d day of March, 1876, recovered a judgment against the appellant, in the Knox Circuit Court, for \$592.55, upon which an execution was duly issued, and to satisfy it the sheriff levied upon the real estate in controversy, as the property of the appellant, and sold the same to

said Grimes, who paid the purchase-money therefor and obtained from the sheriff a certificate of purchase, which he afterwards assigned to Sarah Grimes, who, as the owner and holder thereof, received from the sheriff, after the time allowed by law for the redemption of the property from said sale had expired, a deed of conveyance for the property, and she subsequently sold and conveyed the same to the appellee.

It is insisted by the appellant that the evidence shows that the sale so made by the sheriff was void:

1st. Because the property was not properly described, or sufficiently identified by the sheriff in his levy of the execution, as shown by his return indorsed thereon.

2d. Because the property was not sufficiently described in the sheriff's deed.

3d. Because the property was sold by the sheriff without an appraisalment of the rents and profits thereof, or an offer to sell the same for a period not exceeding seven years.

As to the first and second objections presented by the appellant to the validity of the sale, it is sufficient to say that the property which was levied upon and sold by the sheriff to satisfy the judgment, was described by him, in his return to the execution and in his deed to Sarah Grimes, exactly the same as it was described in the deed of conveyance to the appellant, and upon which the appellant solely relied, on the trial of the action, to establish his title to the property and his right to its possession. If the description was so radically defective as to destroy the validity of the sheriff's levy and deed, as contended by the appellant, it also, for the same reason, rendered his deed void, and, therefore, the finding and judgment of the court below was correct, as the burden of proof rested upon the appellant to prove the truth of the averment in his complaint, that he was the owner of the property and entitled to its possession. In cases like this, if the plaintiff fails to show title and right of possession in himself, he can not recover in the action, although the defendant has no title to the property and is not entitled to its

possession. *Mull v. Orme*, 67 Ind. 95; *Deputy v. Mooney*, 97 Ind. 463. Because, in such cases, the plaintiff's right to recover depends upon the strength of his own title, and not on the weakness or want of title in the adverse party.

As to the last objection, it was recited in the sheriff's return to the execution that he had caused the property to be appraised before its sale, and it was also recited therein, and in the deed executed by him, that before selling the fee simple of the property he offered for sale its rents and profits for a period not exceeding seven years, and received no bid therefor. If an appraisement of the property was required to give validity to the sheriff's sale, proof that it was appraised was not incumbent on the appellee, as he was only bound to show a valid judgment, execution, sale and sheriff's deed. *Mercer v. Doe*, 6 Ind. 80; *Rorer Jud. Sales*, section 716. And in the absence of competent proof showing the failure of the sheriff to cause the property levied upon by him to be appraised, as required by law, it will be presumed that he, in that respect, performed his duty. *Mercer v. Doe, supra*; *Evans v. Ashby*, 22 Ind. 15. It is claimed by the appellant, that the appraisement which purported to be filed with the sheriff's return to the execution omitted to show that the rents and profits of the property had been appraised. The appraisement so filed can not be regarded as a part of the return, because it is only when property levied on remains unsold that the sheriff is required to return the appraisement with the execution (R. S. 1881, section 740), and even then it is not essential that the fact of such appraisement should be noted in the return indorsed on the execution. *Thurston v. Barnes*, 10 Ind. 289. A sheriff's return to an execution is competent evidence only as to such facts as he is required by law to set forth in his return. As to other facts, it is not even *prima facie* evidence of the truth thereof as between the parties to the proceeding, or third parties, nor in the officer's own favor. *Rorer Jud. Sales*, section 722. A purchaser at a sheriff's sale is not required to see that the sheriff makes a

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return to the execution, nor are his rights affected by the sheriff's failure to make a return, or by his making an imperfect or incorrect one. *Doe v. Heath*, 7 Blackf. 154; *State, ex rel., v. Salyers*, 19 Ind. 432; *Rorer Jud. Sales*, section 716.

The motion for a new trial was properly overruled by the court.

As there is no error in the record the judgment should be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed April 8, 1885.

No. 11,752.

McCLAMROCK v. FLINT ET AL.

CONTRACT.—Pleading.—A. bought a wind-mill of B., for which he agreed to pay one hundred dollars in cash "when," as the contract provided, "the mill is up and in good working order," and in the contract was written this stipulation: "If you accept this order and ship me the goods ordered above, it is with the distinct understanding, and is a part of this contract, that if the mill does not work well for sixty days after erected, I am to notify you, and give you sixty days after the receipt of such notice by you in which to remedy the defect, and if you can not make it work well you are to remove the wind-mill and release me from the amount which I have paid for said mill as above stipulated."

Held, that this provision did not make it necessary for the seller to aver in his complaint that the mill did work well for sixty days, but that the effect of the stipulation is not to postpone the cash payment, but to enable the buyer to get back the money paid by him if the mill did not so work.

SAME.—Warranty.—It is not sufficient to aver in general terms that a wind-mill, sold under the provisions of the contract above set forth, did "not work well," but the particulars wherein it was defective, or wherein it failed to work, must be stated.

SAME.—Sale.—Implied Warranty.—Where a manufacturer sells an article manufactured by him with knowledge of the place where it is to be used, and the purpose to which it is to be applied, he impliedly warrants that it is reasonably fit and suitable for such place and purpose.

From the Montgomery Circuit Court.

101	278
196	141
101	278
137	189
101	278
140	161
101	278
158	330

McClamrock v. Flint *et al.*

P. S. Kennedy, S. C. Kennedy, A. Thomson, T. H. Ristine and H. H. Ristine, for appellant.

J. Wright and J. M. Seller, for appellees.

ELLIOTT, J.—The appellees agreed to erect and equip a wind-mill for the appellant, for which he promised to pay them \$100 in cash “when,” as the contract recites, “the mill is up and in good working order.” The contract contains, among others, the following provision: “If you accept this order and ship me the goods ordered above, it is with the distinct understanding, and is a part of this contract, that if the mill does not work well for sixty days after erected, I am to notify you, and give you sixty days after the receipt of such notice by you in which to remedy the defect, and if you can not make it work well you are to remove the wind-mill and release me from the amount which I have paid for said mill as above stipulated.” This provision did not make it necessary for the appellees to aver in their complaint that the mill did work well for sixty days, for the effect of the provision is not to postpone the payment agreed to be made in cash, but to enable the appellant to get it back if the wind-mill did not work well for that length of time. It was not incumbent upon the appellees to do more than allege that they had performed their part of the contract, by erecting the mill and putting it in “good working order.” If the mill did not “work well” for sixty days the appellant, after having given the notice specified, might have defended on that ground, but he can not impeach the complaint by asserting that it fails to aver that the mill worked well for sixty days after its erection.

The answer and the cross complaint of the appellant alleged that the wind-mill did not work well, but they do not state in what particular part the mill was defective, nor wherein it failed to work well. These pleadings are not sufficient. It is not enough to plead in general terms that a mill, machine, or the like, does not work well. There must

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be some specification of the defects, some description of the character of the defect; for otherwise the adverse party could not be justly apprised of the character of the evidence which will be adduced against him. A defendant who alleges that a mill or machine does not work well simply states his own judgment; he does not state a traversable fact. No one can say without knowing what the standard is that he selects, whether the judgment is reasonable or unreasonable, for one man's standard may require much more than is reasonable, while another's standard may be so low as not to require that his mill or machine may do reasonably well. Even in selling property, a statement that a machine will perform well is only regarded as a mere commendation, and certainly the statement of the converse of that proposition, by averring that it will not work well, without showing how it was tested or wherein it was defective, can not be sufficient in a pleading. *Case v. Wolcott*, 33 Ind. 5; *Booher v. Goldsborough*, 44 Ind. 490; *Lafayette Agri'l Works v. Phillips*, 47 Ind. 259; *Robinson Machine Works v. Chandler*, 56 Ind. 575, p. 580; *Myers v. Conway*, 62 Ind. 474; *Neidefer v. Chastain*, 71 Ind. 363 (36 Am. R. 198); *Johnston Harvester Co. v. Bartley*, 81 Ind. 406. If it be conceded that the answer to the counterclaim and the reply to the answer were bad, still there can be no reversal on that account, for a bad answer is good enough for a bad complaint, and so, likewise, a bad reply is good enough for a bad answer.

The appellant proved that he showed to the agent of the appellees, through whom the sale of the mill was negotiated, the place where it was to be used, and that the agent examined the place and said to him, while on the spot selected and designated, "That this wind-pump would work all right at that place, and the order for the pump was then and there signed." There was also evidence tending to prove that the appellees were manufacturers of wind-mills. On the contract between the parties is this endorsement: "This com-

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pany will not recognize or be responsible for any understanding with agents that is not in this order."

The court instructed the jury as follows: "The particular place on the farm of the defendant where the wind-pump was to be erected is not named in the contract, and if the defendant selected the place himself, and the mill failed to work solely on the ground of the place where it was erected, then the defendant can not relieve himself from liability on account of such failure." This instruction was not a correct statement of the law.

There is no conflict in the evidence upon the point that the agent of the appellees examined the place where the mill was to be used, and as they were manufacturers of the mill, and knew the particular place and purpose for which it was bought, there was an implied warranty that it would be reasonably serviceable in that place. Where a manufacturer makes for himself an examination of the place where a wind-mill is to be used, and knows the purpose to which it is to be applied, he impliedly warrants that it is suitable for that purpose and place. A farmer who exhibits to the manufacturer the place where he proposes to use the article he is negotiating for, and gives full information of the purpose for which it is wanted, has a right, within reasonable limits, to rely upon the superior knowledge and judgment of the manufacturer. The person who manufactures an article is presumed to know its capacity and its adaptability to do the work he is informed the buyer expects and intends it to do. It would be unreasonable to expect a purchaser to know as much about a wind-mill or any other machinery as the person who makes it. In the case of *Port Carbon Iron Co. v. Groves*, 68 Pa. St. 149, the court approvingly quoted from 1 Parsons Contracts, section 586, the following: "If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose." And the same statement of the law was approved in *Park v. Morris, etc., Co.*, 4 Lansing, 103. In a recent work

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it is said: "Where a manufacturer or dealer contracts to supply an article, which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied, since here, the buyer does not purchase upon his own judgment, but relies upon that of the seller." Biddle Warranties, section 167. The authorities are abundant, but we deem it only necessary to add to those cited the cases in our own reports. *Brenton v. Davis*, 8 Blackf. 317; *Page v. Ford*, 12 Ind. 46; *Street v. Chapman*, 29 Ind. 142.

Contracts are to be read by the light of surrounding circumstances. Reading this contract by that light and by the light shed by the authorities to which we have referred, it is plain that the appellees' undertaking was that the wind-mill would work well at the place designated by the appellant and examined by the appellees before the contract was signed. At the time the instrument was signed, the spot was pointed out and full information was imparted to them. It would be most unreasonable to hold that the buyer was bound to pay for a mill that would not work at all in the place agreed upon. There was in this instance something more than information of the purpose for which the article was intended, there was, in effect, an agreement as to the place where it should be located and used. The manufacturer was bound to know whether the mill would work well at the place chosen, and as it did not, he has no right to compel payment of the agreed price. The price agreed upon was for a wind-mill that would work well on the place selected, and not for one that would work well in an open plain or upon a hill-top.

Granting that the endorsement in the contract limiting the authority of the agent bound the appellant, still the instruction can not be sustained. The agent had authority to sell a wind-mill that would be reasonably suited to the purpose for which the buyer wanted it. In undertaking to sell

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a wind-mill that would work well in the place where it was intended to be used, the agent added nothing to the contract. The law enters into all contracts, and the law puts into the contract the provision, that the mill should be reasonably suitable for the use to which the parties knew it was to be put. The doctrine was thus stated in *Jones v. Just*, L. R., 3 Q. B. 197: "Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied." At another place in the same opinion, the warranty was said to be "an implied term of the contract." 2 Addison Contracts, sections 618, 619.

A contract is always to be applied to its subject-matter. The subject-matter of the contract in this case was a wind-mill that would "work well" in the place designated, not some wind-mill, or any wind-mill, but a wind-mill that would be reasonably adapted to the place chosen for its location. The appellant did not propose to buy any other, nor the appellees undertake to sell any other.

There is a sharp conflict in the authorities as to whether an implied warranty can exist where there is an express one, many ably considered cases holding that it may exist unless the express warranty covers the whole subject. *Bigge v. Parkinson*, 7 H. & N. 955; S. C., 31 L. J. Ex. 301; *Merriam v. Field*, 24 Wis. 640; *Boothby v. Scales*, 27 Wis. 626; *Wilcox v. Owens*, 64 Ga. 601. But we need not decide what the rule would be in a case where there was an express warranty, for here there is no express warranty, and the one implied by law is not excluded.

Judgment reversed.

Filed April 1, 1885.

Naugle et al. v. The State, ex rel. Burton.

No. 11,433.

NAUGLE ET AL. v. THE STATE, EX REL. BURTON.

EVIDENCE.—*Harmless Error*.—The admission of improper evidence is harmless, where it appears that there was other undisputed evidence given clearly proving the only fact upon which the improper evidence could have borne.

GUARDIAN AND WARD.—*Final Report*.—*Discharge*.—*Record*.—*Evidence*.—*Payment*.—A final report of a guardian showing a sum in his hands due the wards, with a prayer to be discharged, followed by an order approving the report and discharging the guardian, is no evidence that he paid the money.

SAME.—*Liability of Sureties*.—Where a guardian is discharged with money of the ward in his hands, which has never been accounted for or paid, and some years later is re-appointed, and thereafter accounts only for other moneys received during the second appointment, the sureties on the first bond are liable.

From the Monroe Circuit Court.

J. W. Buskirk and *H. C. Duncan*, for appellants.

J. F. Morgan, for appellee.

MITCHELL, J.—On the 1st day of October, 1870, Israel Naugle was duly appointed guardian of the minor heirs of Ellis Burton, deceased, and filed his bond to the approval of the clerk of the Monroe Common Pleas Court, with William Stuart as surety.

On the 3d day of September, 1883, the relator, one of the heirs of Ellis Burton, having attained his majority, brought this suit on the bond, assigning, among other breaches, that the appellant had failed to account for and pay over the moneys which had come to his hands from a pension to which the relator was entitled in virtue of the service and death of his father in the army.

The court found the facts specially, and stated as a conclusion of law thereon that there was due the relator the sum of \$133, for which he had judgment.

1. It is argued that the complaint, to which a demurrer was overruled below, is bad, because it does not aver that the

101	284
131	134
101	284
134	300
136	202
101	284
138	88
101	284
147	582
101	284
161	295

Naugle *et al.* v. The State, *ex rel.* Burton.

Robert W. Burton therein referred to is the relator, and the case of *Fee v. State, ex rel.*, 74 Ind 66, is relied on.

We think it fairly appears from the complaint that the relator and the Robert W. Burton mentioned in the body of the complaint is the same person. It can be gathered from its averments that the plaintiff's father, Ellis Burton, died in the United States service, and that a pension was allowed by the government to his minor heirs, and that Naugle was appointed guardian for "said minor heirs," among whom was one named "Robert W. Burton." As it may be presumed that the relator's father had but one child named Robert W. Burton, we may by that means arrive at the conclusion that the relator was the Robert W. Burton for whom Naugle was appointed guardian, and, by carrying that presumption through the complaint, identify him as the person therein referred to by that name.

2. We are also asked to determine the correctness of the ruling of the court in admitting in evidence, over the appellants' objection, an exemplified copy of the book of accounts of R. M. Kelley, U. S. pension agent at Louisville, Kentucky, showing the amount and dates of payments made by him as pension agent to the appellant Naugle.

Whether the certificate embracing a copy of the account, as it is alleged to appear on the books of the pension agent, was properly admitted is a question involved in some doubt. We are aware of no statute law or other public regulation which requires a pension agent to keep any such books of account or any other record of his official acts, as in *Wells v. State, ex rel.*, 22 Ind. 241. Yet, from the nature of the business conducted in those offices, it is doubtless necessary that some system of accounts should be and is prescribed or adopted for recording the particular transactions in books, which records are in a sense public. 1 Greenl. Ev., sections 483, 484. Without deciding the question whether this certificate was properly admissible in evidence or not, it is apparent from the whole record that its admission was harmless to the appellant.

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The certificate from the pension agent shows that Naugle was paid on account of pensions for his wards, between the dates of July 19th, 1871, and September 9th, 1872, \$444.54, and this comes within ninety-seven cents of the amount he charges himself with in the reports made by him to the court during his first period of service as guardian, which reports are properly in evidence. The certificate shows further that there was paid to Mr. Naugle on account of his ward's pension, on May 31st, 1877, during his second period of service as guardian, the sum of \$330. That this last amount is correct is tacitly admitted by the appellant in his deposition, wherein he shows that during this period he paid of this sum \$313 to his successor, Mr. Draper, whose receipts he exhibits, besides showing other disbursements made by him which more than account for the whole of it. As he is not charged with money accruing from any other source, and as he makes no denial of having received all that is charged from that in question, it results to a demonstration that he was not injured by the certificate of Mr. Kelley.

3. The appellant also complains of the ruling of the court in refusing to suppress the deposition of Herbert Edington, on account of the informality of the notice, but as the testimony given by Edington, and that given by the appellant Naugle, on the only point material to the inquiry, were in no way in conflict, but in substantial agreement, we need not determine whether the ruling of the court was correct or not.

4. As regards the letter of Mr. Naugle, written by him to Mr. Dunn, the relator's attorney, which was admitted in evidence over his objection, it may be said that while the writing of the letter was of questionable propriety, we think it was so far in the nature of a proposition for a compromise as that it ought not to have been admitted in evidence. It is the policy of the law to encourage the amicable adjustment of all controversies between citizens, and all communications and conversations which have that end in view are and should be protected. The letter in question, bearing upon its face

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the manifest purpose of seeking a compromise, it should neither have been offered nor received in evidence. Aside from the letter, however, the reports and admissions of the guardian so abundantly establish the facts found by the court that it is again apparent that no injury came to him from its admission.

5. It appeared from the evidence, and it was also found as a fact by the court, that the appellant Naugle resigned his trust as guardian on the 4th day of November, 1873, having in his hands, as shown by his final report, \$108.36 belonging to his ward, Robert W. Burton. The report contained a particular account of his receipts and disbursements, and represented that his ward had gone to the State of Kentucky to reside, and that Herbert Edington had been duly qualified as his guardian in that State. It further contained a request that he might be allowed to pay the money over to Edington, take his receipt therefor, and upon filing the receipt be discharged. This report was confirmed and approved and the guardian discharged without it being made to appear in any way from the record whether the balance stated was ever paid over to Edington or not.

On the 23d day of March, 1877, Naugle was again appointed and qualified as guardian of the relator, and again he resigned on the 2d day of June, 1877.

During his second term he received the \$330 above mentioned, and no more, all of which he disbursed properly, with \$44.15 besides.

The only defalcation shown in the evidence, or found by the court, was the failure to pay over to Edington the \$108.36 which was shown in his hands by his report when he resigned the first time. The court below found this sum, with the interest and penalty, less the \$44.15 above mentioned, as the amount due, and for which he and his bondsman on his first bond were held liable.

It is now argued that the discharge from the first guardianship is conclusive in favor of his bondsman on the first bond,

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so long as such discharge is allowed to stand unrevoked, and the case of *Candy v. Hanmore*, 76 Ind. 125, is relied on. That case, however, decides nothing more which is pertinent to the point under inquiry than that where, upon a final report made by a guardian in which he shows that he has paid out the balance in his hands to his ward, whose receipt is exhibited with the report, and upon which he is finally discharged, such discharge, while it stands, is not subject to collateral attack in a suit by the ward against the guardian. Conceding the authority of that case, as we do fully, it manifestly can have no influence on this. Here the report of the guardian shows on its face that he had in his hands undisbursed at the time of his discharge \$108.36 belonging to his ward Robert W. Burton. He only asked to be discharged upon filing the receipt of Edington, and while it is true the record which follows immediately recites the approval of the report and the discharge of the guardian, it nowhere appears of record that the money was paid or the receipt filed.

That the court discharged him without requiring him first to pay over what his report shows was in his hands, does not amount to an adjudication that he had paid it over. There would be nothing to support such a judgment, as a judgment can never be more comprehensive than the relief asked for, and to which a party in his petition shows himself to be entitled. To prove that the \$108.36 was not paid does not contradict the report or attack the judgment.

6. Finally, it is argued that the first bondsman is not liable for the amount remaining in the guardian's hands when he resigned the first time, that the \$108.36 were assets on hand at that time, and that if any person is liable, it is contended, the liability is under the second bond for not accounting for this sum which remained in his hands. This contention is opposed to *Lowry v. State, ex rel.*, 64 Ind. 421, and a number of other cases.

The guardian was in default as soon as he accepted a discharge with the money in his hands without paying it over,

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and the liability having attached it could only be discharged by payment. That he was appointed guardian a second time some four years later could in no manner affect it.

Judgment affirmed, with costs.

Filed April 2, 1885; petition for a rehearing overruled June 26, 1885.

No. 11,646.

JEWETT ET AL. v. MEECH ET AL.

PARTNERSHIP.—*Conveyance of Partnership Property.*—*Fraud.*—*Bona Fide Purchaser.*—*Notice.*—Where partners convey all the partnership property in payment of the individual debts of the partners, and it is afterwards conveyed to one who takes in good faith for value, without notice of any fraudulent intent, the property can not be subjected to the payment of partnership debts.

PRACTICE.—*Verdict.*—*Interrogatories to Jury.*—A general verdict for plaintiff can not stand against answers of the jury to interrogatories in conflict with it; and in such case the judgment should be for the defendant.

From the Huntington Circuit Court.

L. P. Milligan, O. W. Whitelock and J. C. Branyan, for appellants.

B. M. Cobb and C. W. Watkins, for appellees.

BICKNELL, C. C.—The appellants, in April, 1881, sold goods to Peter K. Meech & Brother. Afterwards Meech & Brother exchanged all their partnership property for real estate, known as the Antioch flouring-mills, and had the deed therefor made to William A. Meech in payment of their individual debts to him. This transaction left Meech & Brother without any property subject to execution.

William A. Meech conveyed the flouring-mills to William H. Meech, by whom they were conveyed to Elward & Kriegbaum.

The appellants, in October, 1881, obtained a judgment

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against Meech & Brother for the value of the goods sold as aforesaid.

In July, 1882, the appellants brought this suit against the appellees, stating the facts aforesaid, and alleging that all of the foregoing conveyances were without consideration, and were made with intent to hinder, delay and defraud them and the creditors of said Meech & Brother, and that each of said grantees took his conveyance with notice of such fraudulent intent, and for the purpose of consummating it. The complaint prayed that said conveyances be set aside, and said real estate be declared subject to the lien of the plaintiffs' judgment.

The record states that the answers of the defendants Peter K. Meech, Benjamin Meech and William A. Meech are not on file. We decide nothing as to the effect of such an omission, because the judgment must be affirmed for the reasons hereinafter stated.

The defendants William H. Meech and Elward & Kriegbaum answered separately that they bought the flouring-mills for a valuable consideration and without notice of any fraud or of any equitable claim upon the property, and they denied all the other material allegations of the complaint. The plaintiff replied in denial of these answers.

The issues were tried by a jury, who returned the following verdict: "We, the jury, find for the plaintiff." There was no demand for a trial by the court, and there was no objection by either party to a trial by jury. Each party put interrogatories, which were submitted to the jury by the court, and which, with the answers of the jury thereto, were returned with the verdict. Among the answers are the following, and there are no others in conflict with them:

"Question. Did they (Peter K. Meech & Brother) on that day convey away all their partnership property and effects? Answer. Yes.

"Question. To whom did they convey the same? Answer. Henry and Lewis Bridge and William H. D. Lewis.

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"Question. To whom did the Bridges convey the real estate taken in exchange for said partnership goods? Answer. William A. Meech.

"Question. For what consideration was that conveyance made, or for what price to William A. Meech? Answer. \$6,000.

"Question. Was not said property accepted by the said William A. Meech for a good and valid consideration, and without any intention of fraud on his part? Answer. Yes.

"Question. Was not the Antioch mill property transferred to William H. Meech for a full and valid consideration? Answer. Yes.

"Question. At the time of the transfer of said property by William A. Meech to William H. Meech, had William H. Meech any notice of any equity or equitable claim on the part of the plaintiffs? Answer. No.

"Question. What consideration has William H. Meech already paid his father for said mills? Answer. Fourteen hundred dollars of mortgages on the mills, and supported his father and mother for fourteen months.

"Question. Were not the assumption of the liens against said property, and the contract to care for the maintenance and support of William A. Meech and his wife a fair and valid consideration for such conveyance? Answer. Yes.

"Question. Does not the evidence show that William H. Meech had no knowledge of any indebtedness of Peter K. and Benjamin F. Meech to plaintiffs at the time of the transfer of said property from William A. Meech to him? Answer. Yes."

The defendants William A. Meech, William H. Meech, William A. Elward and William Kriegbaum, severally moved the court for judgment in their favor on the answers to the interrogatories, notwithstanding the general verdict. These motions were sustained, and the plaintiffs recovered only a judgment against Peter K. Meech and Benjamin F. Meech

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for the amount of their claim against them. The plaintiffs appealed. The evidence is not in the record.

The only errors assigned are, that the court erred in sustaining the several motions aforesaid for judgment, notwithstanding the verdict.

The only question is, are the answers to the interrogatories so inconsistent with the general verdict that they can not be reconciled therewith? We think they are. The general verdict implies that the fraud alleged was proved; the answers to the interrogatories show that such fraud was not proved.

A conveyance of real estate, for which a valuable consideration has been paid, can not be set aside for fraud without proof that the grantee was privy to the fraud. In the present case, the answers to the interrogatories expressly declare that William A. Meech took his conveyance for a good and valid consideration and without any intention of fraud on his part, and that William H. Meech took his conveyance for a full and valid consideration, and without notice of any equity or equitable claim on the part of the plaintiffs. A purchaser for a valuable consideration without notice can transfer a valid title.

The appellants seem to suppose that they had a lien on the Antioch flouring mills, because it was either partnership property or the proceeds of partnership property. But the "claim of the joint creditors is not such a lien upon the partnership property but that a *bona fide* alienation to a purchaser for a valuable consideration by the partners, or either of them, before judgment and execution, will be held valid. Upon a dissolution of the partnership, each partner has a lien upon the partnership effects, as well for his indemnity as for his proportion of the surplus. But creditors have no lien upon the partnership effects for their debts. Their equity is the equity of the partners operating to the payment of the partnership debts." 3 Kent Com. 65. *Trentman v. Swartzell*, 85 Ind. 443; *Barkley v. Tapp*, 87 Ind. 25. The same doctrine is asserted in Story on Partnership, section 358,

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concluding thus: "It follows that those effects are susceptible of being legally transferred, *bona fide*, for a valuable consideration, to any persons whatsoever, and as well to the other partners as to mere strangers." See, also, *Lewis v. Harrison*, 81 Ind. 278; *Lindley Partnership*, 681; *Story Partnership*, section 97.

The court below did not err in sustaining the motions of the defendants William A. Meech, William H. Meech, William Elward and William Kriegbaum for judgment in their favor upon the answers to the interrogatories.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed April 10, 1885.

No. 10,480.

WOLFE v. PUGH, ADMINISTRATRIX.

FRAUD.—*Conspiracy.—Exchange of Real Estate.—Rescission of Contract.—*

Fraudulent Representations.—Pleading.—Complaint.—A complaint for the rescission of a contract for the exchange of real estate, which alleges, in substance, that W. and two others, for the purpose of defrauding plaintiff of a valuable farm, conspired together, and falsely and fraudulently represented that W. was the owner of a certain tract of good, tillable land, with valuable improvements thereon, desirably located in a certain county in another State, and worth a certain substantial sum, which he would convey to plaintiff in exchange for his farm and pay him a certain cash difference, and by falsehood and device impressed him with the desirability of the trade, without an inspection of the land; whereas such land is swamp land, wholly unimproved, situated in a different county from that represented, and almost wholly worthless, of all which plaintiff was ignorant until after an exchange of deeds, states a good cause of action.

SAME.—*Parties to Conspiracy.*—All who concur in and willingly and knowingly become parties to, and further a conspiracy, are parties to it without proof of other or previous agreement to concur in or further it.

101	293
126	57

101	293
132	247

101	293
165	632

101	293
169	314

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SAME.—Evidence.—Acts, Declarations and Representations of Co-Conspirator.—

The acts, declarations and representations of an alleged conspirator are not binding upon absent parties, nor competent evidence against them, until there has been proof of a conspiracy; but when that is established, such acts, declarations and representations become competent evidence against all parties shown to have been connected with such conspiracy, if in furtherance of that object.

SAME.—Agency.—There may be an agency, and also a conspiracy to defraud, between the same persons and relating to the same transaction.

SAME.—Principal and Agent.—Liability of Principal for Fraud of Agent.—

Where a principal authorizes an agent to effect an exchange of lands with a third person, he is answerable for and is bound by the acts and representations of the agent, and the instrumentalities employed by him in accomplishing that end, even though the agent is guilty of fraud which the principal did not direct, and of which he did not have knowledge.

SAME.—Evidence.—Rescission.—The acts and representations of the agent in the way of inducing the third person to make the trade, and the acts and declarations of another, in the presence of the agent, who is used by him as a means of deceiving such third person, are competent evidence against the principal in an action for rescission.

PRACTICE.—Objection to Evidence Before it is Given.—It is not error for the trial court to overrule an objection to the testimony of a witness made before such testimony is given, and when the court can not know what it will be.

SAME.—Motion to Strike Out.—It is not error to overrule a motion to strike out certain evidence as a whole, where a part of it is competent.

SAME.—Harmless Error.—If a judgment is right upon the evidence, it will not be reversed because of erroneous instructions.

From the Sullivan Circuit Court.

J. T. Hays, H. J. Hays, S. Coulson, T. J. Wolfe and J. M. Humphreys, for appellant.

J. C. Briggs, G. W. Buff, J. B. Patten, C. E. Barrett and J. T. Beasley, for appellee.

ZOLLARS, C. J.—Charles E. Pugh was the plaintiff below, and based his action on the ground that he had been defrauded in a land transaction. Subsequent to this appeal Pugh died, and his administratrix has been substituted as appellee. The complaint may be epitomized as follows: Charles E. Pugh, a young man, inexperienced in business, owned two tracts of

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land in Sullivan county, and was offering to sell an eighty-seven-acre tract, worth \$2,000, so as to be enabled to pay off a mortgage upon the other tract. Knowing this, appellant, John E. Osborn, and Jesse Trueblood, for the purpose of cheating and defrauding Pugh out of his eighty-seven-acre tract, conspired and confederated together, and falsely, fraudulently and knowingly represented to him that appellant Wolfe was the owner of eighty acres of land in Crawford county, Illinois, five and one-half miles southwest of Robinson, the county seat of the county, which was good tillable land, with good and valuable improvements thereon, and worth \$1,500. As a part of the conspiracy, and in furtherance of it, they proposed to Pugh that Wolfe would take his land and therefor give him the Illinois land and \$500 in cash. Osborn, with the full knowledge of Wolfe, represented to Pugh that he knew a man, Trueblood, who would purchase from him the Illinois land at \$1,150 cash so soon as the trade between Wolfe and Pugh should be consummated. Trueblood represented to Pugh that he knew of the Illinois land, as he had a brother who owned and lived upon an adjoining tract, and that so soon as Pugh should become the owner of the land, he, Trueblood, would give him \$1,150 for it, and upon Pugh consenting, Trueblood gave to him a watch to bind the bargain. They also represented to Pugh that Wolfe wanted his land so as to exchange it for property nearer to him; that he had made a contract with one James McKee to take the land, and that to save the expense of two deeds Pugh and wife should make a deed direct to McKee. They also stated that Wolfe would execute a deed to Pugh for the Illinois land, and leave it with the county recorder to be delivered so soon as they could perfect the trade with McKee, and he paid the \$700 "boot money" under their agreement with him, and that when McKee should have paid this money, the deed should be delivered to Pugh, and the \$500 cash should be paid to him, and that Pugh could then complete his sale to Trueblood, and get from him the \$1,150 for the Illinois land. Pugh and wife

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executed their deed, conveying the land to McKee, and delivered it to Wolfe. Shortly after this the deed for the Illinois land was delivered to Pugh, and the \$500 was paid to him by Wolfe. Pugh was ignorant of the quality, location and value of the Illinois land, and relied upon the representations of the other parties as to its quality, value and location, and relied upon Trueblood taking it from him at \$1,150. All of their representations concerning the land were false and fraudulent, and known by the defendants to be such. Wolfe did not own land in Crawford county within five and one-half miles of Robinson. He owned eighty acres in Lawrence county, Illinois, which was not and is not tillable for any purpose, but, on the other hand, is swamp land, without any kind of improvements upon it, and is not, and was not, worth over \$80. Of all this Pugh was ignorant until after the exchange was consummated and the deeds had been delivered. Upon an examination of his deed from Wolfe he learned for the first time that the land was not in Crawford county, and still subsequent to this he learned of the other frauds practiced upon him. He also learned for the first time, after the trade was consummated and the deeds passed, that Trueblood was financially worthless, and that his proposition to purchase the Illinois land was but a trick, in furtherance of the conspiracy to cheat him out of his land in this State. Upon learning of these frauds, Pugh tendered to Wolfe the \$500, a deed of reconveyance of the Illinois land, and demanded a deed for the land conveyed to McKee.

This complaint clearly states a case in favor of Pugh. As to the Illinois land, the representations were not simply as to its value; they went further, and stated those things upon which value rests. The land was represented as being good, tillable land, with valuable improvements thereon, and situated within five and one-half miles of the county seat. It is averred that all of these representations were false and fraudulent, and known by the parties to be so; that the land was not thus situated, but was many miles away in another

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county; that the land was not tillable for any purpose, was swamp land, without any kind of improvements, and hence almost wholly worthless. The part taken by Trueblood was well calculated to assist in misleading a man inexperienced in business affairs, impress him with the desirability of the trade, and turn him aside from going and making a personal inspection of the land for himself. But under the circumstances as detailed in the complaint, Pugh was not bound to go into another State and inspect the land. The parties, having represented to him the location and quality of the land, and the extent of the improvements, and thus gotten from him a valuable farm for almost nothing, can not turn upon him now, admit all of this falsehood and fraud, and, in refusing to make reparation, charge him with carelessness in accepting as true what they, by asseveration and device, sought to impress upon him as true. It does not lie with them to say that because he trusted to their word, instead of suspecting them of falsehood, they are entitled to the fruits of their falsehood, and he is without remedy. This is well settled by authority. *West v. Wright*, 98 Ind. 335, and cases there cited.

There was no error in overruling the demurrer to the complaint. The complaint, as will be observed, was filed against Wolfe, Osborn and Trueblood. Trueblood was defaulted. No further notice seems to have been taken of him in the subsequent proceedings. Osborn was not found. The case proceeded to trial and judgment against Wolfe alone.

He assigns as error here the overruling of his motion for a new trial, and under that assignment argues that the evidence is insufficient to sustain the verdict and judgment, and that the trial court erred in the admission of certain testimony, and in giving and refusing certain instructions.

The plaintiff, Pugh, was a witness, and detailed the transaction, in substance, as follows: When in Sullivan, on the 4th day of April, 1881, he met and had a conversation with John E. Osborn on the street; being asked by Osborn whether he would sell his land, he answered that in order to

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get money to pay off a mortgage upon another tract, he would sell it for \$1,700 cash; Osborn said that he had eighty acres of land in Illinois to sell for appellant, Wolfe, and upon being asked by Pugh as to its location, said that it was five and one-half miles southwest of Robinson, in Crawford county; that it was high, rolling prairie, and as good land as a "crow ever flew over," and worth eighteen hundred dollars; that the fences upon it had been burned; that he knew a man by the name of Trueblood, who had sold land for \$1,200, and wished to buy land in Crawford county, Illinois, and that Pugh, if he became the owner of Wolfe's land, could sell it to Trueblood for \$1,200 cash; that he, Osborn, would see Trueblood for him, Pugh, about the matter, and that if he, Pugh, would come to Sullivan on the following Wednesday, he and Trueblood could go by rail to Robinson, get a "rig" there and go and see the Wolfe land. At that time, Pugh had never seen Trueblood. In the evening of the day on which this conversation was had, Pugh, at the request of Osborn, went with him to see Wolfe at his store. Pugh told Wolfe that Osborn had said that he, Wolfe, would exchange his land for Pugh's, and give to him as a difference, \$500. Wolfe answered that he would do so; to go on and make the trade, and he would stand good for it; that he was busy in the store, and as a member of the grand jury, and had gotten Osborn to make the trade for him. Upon being asked by Wolfe, how long it would take him to decide as to the trade, Pugh answered that he would decide so soon as he could go and look at the Wolfe land, as he had a man to take it off his hands. And in answer to a question as to how they were going, Pugh answered that they would go by rail to Robinson, get a "rig" there and go and see the land. Wolfe then said, "Hurry up; if we trade, I want to do so and not fool about it," and then walked away.

On the following Wednesday evening, Pugh saw Wolfe at his store, and asked for Osborn. Wolfe answered that he had sent him to look at Pugh's farm, and that he would return in

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a short time. On his way to the hotel Pugh met Osborn and Trueblood, and said to them that he and Trueblood would go and see the Wolfe land. Trueblood said that was of no use, as he had just come from the land, and knew all about it, and that he would give for it \$1,000 in cash and his note for \$150; that he wanted to keep \$200 of the amount for which he had sold his land to build fences on the Wolfe land. He gave to Pugh a silver watch to bind the bargain, and said that to give time for Pugh to perfect his trade with Wolfe he would meet him on Saturday or Monday following, and close up the purchase. Pugh called on Wolfe on the following morning and asked him about his Illinois land. He answered that it was good land; that he had been on it; that the only trouble was the fences had been burned; that he would not trade but for the fact that he could exchange Pugh's farm for property in Sullivan, near to him. Pugh said he was ready to exchange deeds. Wolfe answered that he would write his deed, and that Pugh should have his made to McKee. Subsequent to this Osborn and Pugh called Wolfe from the grand jury room, and showed him Pugh's deed. Wolfe handed the deed to Osborn and told him to go and deliver it to McKee and get the money, and asked Pugh to wait for his \$500 until the return of Osborn, as that would relieve him of the trouble of getting it elsewhere. Said he would let the county recorder hold his deed until the return of Osborn. Pugh asked him if his deed was all right, to which he answered that it was, and that if it was not he would make it right. On Friday following Pugh met Wolfe and Osborn in the recorder's office. Wolfe there paid to him the \$500, and also gave to Osborn some money. The recorder then handed to Pugh the Wolfe deed. As they all left the court-house, Pugh remarked that he must get his deed from Wolfe recorded. Wolfe turned, took the deed from Pugh, saying that he had a cousin in Illinois, and would send the deed to him to have recorded. They all went to Wolfe's store. At the request of Pugh, Wolfe wrote from the deed a description of the Illinois land. From this, for the first time, Pugh

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learned that it was located in Lawrence, and not in Crawford county. He mentioned this fact to Wolfe, who answered that if he had been asked about the matter he would have told him that the land was in Lawrence county. While Wolfe and Pugh were talking Osborn went to the bank. These deeds were made on the 7th day of April, 1881. On the 14th day of the same month Pugh demanded a rescission of the contract, and made the proper tenders, etc. Trueblood was a lightning-rod peddler, and utterly worthless financially. Osborn was no better. A few days after the trade Osborn left for Kansas, and is still absent.

The evidence shows conclusively that Pugh's land was worth between \$1,700 and \$2,000; that Wolfe's was not worth over \$100, and that every representation concerning it was false.

W. G. Brodus testified that before the consummation of the trade, and in the absence of Wolfe, Osborn told him that he, was trading Wolfe's land to Pugh, and wanted to buy a watch to give to Trueblood to bind the bargain between him and Pugh; that he had not time to get the money from Wolfe; that he had had Sol Walls to assist him in making the trade with Pugh, but he was not as efficient as Trueblood. The witness sold the watch to Osborn for \$8, which Trueblood afterwards gave to Pugh.

Another witness testified that prior to the trade Wolfe told him that he thought the trade would be made.

Park Beard testified that a short time before Osborn went away he saw him in Wolfe's store in close conversation with Wolfe. He said he had been helping Wolfe make the trade, and had made \$1,000. Wolfe replied: "Yes, he made a nice thing."

Wm. Joyce testified that on the day the trade was made, he had a conversation with Osborn in Pugh's presence, in front of Wolfe's store, but in the absence of Wolfe, in which conversation Osborn made representations as to the location, quality and value of the Wolfe land.

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James McKee testified that Osborn came to his house in the country on Wednesday before the trade, and said that he had traded for Pugh's land, and wanted to sell it to him; said he had just come from Illinois, and wanted to sell the land to start a grocery store. McKee offered him \$700 in cash and his notes for \$600. On the next day Osborn went to McKee with the Pugh deed, and wanted the money and notes. McKee declined to pay anything until he could examine the title to the land. Osborn requested him to go to Sullivan early the next day, as he wanted to purchase his stock of groceries. On the next day McKee went to Sullivan, and on seeing that the deed was from Pugh to him, reminded Osborn of his statement that he owned the land, and declined to make any payment until he could see Pugh. Osborn answered that the deed was thus made to save expense. McKee finally put the money and notes into the hands of the county recorder, to be delivered to Osborn if Pugh should say that it was all right. McKee never owned any property in Sullivan.

Calvin Bunch testified that before the trade was made, he asked Osborn for money on a debt. Osborn told him that so soon as he finished a trade he was making for Wolfe, he would pay; that he had a d—d nice thing; that he was selling some land for Wolfe, and would make four or five hundred dollars. Wolfe was not present at this conversation. Subsequent to this, the witness saw Wolfe and Osborn in close conversation in Wolfe's store.

A. Mitchell testified that one day Wolfe was late in getting to the grand jury room, and excused his tardiness by saying that he had made more by trading than he could as a grand juror.

The county recorder testified that McKee left with him \$700 in money and his notes for \$600. Wolfe, Pugh and Osborn having met in his office, he handed \$500 to Wolfe, and he paid it over to Pugh. The balance of the money and notes he gave to Osborn.

Daniel Spilkey testified that before the trade he had a

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conversation with Osborn at his house, in the absence of Wolfe, and in the presence of Trueblood. Upon being asked to pay a debt to witness, Osborn said that he could pay as soon as he completed a trade they were making for Wolfe. The witness then told Osborn that he knew Wolfe's land, and that it was worth nothing. Osborn answered that they did not care for that, that they intended to swindle some one. The next day the witness met Osborn on the street, and again asked him for money. Osborn said he had made the trade, and had the money in his pocket; that he had made \$250 and a suit of clothes. Wolfe was a dealer in clothing.

H. K. Wilson testified that after the \$500 had been paid to Pugh by Wolfe, either Wolfe or Osborn said to the other, "Let us go and fix that," and that thereupon they left the recorder's office, followed in a few minutes by Pugh.

W. C. Shattuck testified that he sold the Illinois land to Wolfe, and that Wolfe wanted him to take it back, because it overflowed.

Miles Miller, another witness, stated that he saw Wolfe and Osborn in the recorder's office. Osborn said he was making a land trade for Wolfe and was to get \$250 for his services, to which Wolfe answered: "Yes, and your money is ready as soon as you get through." Upon hearing this, the witness crossed the street and informed his brother, to whom Osborn was indebted.

We have thus set out the substance of the most material evidence in favor of appellee. It is true that appellant squarely denied the whole of it, but it was for the jury to determine to whom credence should be given. They seem to have given credit to appellee's witnesses in preference to appellant. We can not disturb the preference.

There can be no question that Pugh was defrauded out of his farm. The representations made and devices resorted to were well calculated to throw off his guard, mislead and deceive a person much more experienced in business affairs than Pugh was.

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Wolfe's representations and conduct, aside from Osborn and Trueblood, it may well be said, were such that he ought not to be heard to say that Pugh was the loser by his own fault. He had been upon his Illinois land and knew that it was practically worthless, because of overflows, and yet he represented to Pugh that it was good land. He represented as a reason for making the trade, that he could exchange Pugh's land for town property near him, and yet he must have known that McKee owned no town property to exchange.

When Pugh told him that he would go by rail to Robinson, and there get a "rig" and go and see the Illinois land, he knew that the land could not be thus reached because it was situated in another county, and yet he did not inform Pugh of that fact, but urged haste in the consummation of the trade. Withholding his deed until Pugh's was delivered, and then taking it with an offer to send it for record, before Pugh had examined it, indicates a desire to keep Pugh in ignorance of the true location of the Illinois land until it would be too late for him to recall his deed, because of its delivery to McKee. There is no reasonable doubt that Osborn was acting for Wolfe in bringing about, and consummating the trade. And from the whole evidence, we can not say that the jury might not well have concluded that Wolfe conspired with Osborn and Trueblood to cheat and defraud Pugh. If there was such a conspiracy, or if Osborn was Wolfe's agent to sell his land, his acts and representations, and the acts and representations of Trueblood connected with the transaction, were competent evidence against Wolfe.

It may be conceded, as contended for by appellant's counsel, that if Osborn was an agent, he was a special agent, and could not bind Wolfe beyond the scope of the agency; but it does not follow from this that his acts and representations in bringing about and consummating the trade, are not binding upon Wolfe. Having given Osborn authority to bring about and consummate the trade, Wolfe must be bound by his acts, statements and representations in accomplishing that end.

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When a principal authorizes an agent to do a certain thing, he is answerable for and bound by the acts and representations of the agent in accomplishing that end, even though the agent is guilty of fraud in bringing about the result. Having given such authority, the principal is responsible for the fraudulent as well as the fair means used by the agent, if they are in the line of accomplishing the object of the agency. Having put the agent in a position where he may perpetrate a fraud upon innocent third parties, the principal will not be allowed, as against such third parties, to retain the fruits of the fraud and defeat a claim for reparation by saying that he justifies the end, but not the means used by the agent. Conceding that the principal is innocent of any active fraud, yet, when a case arises that he or an innocent third party must suffer by the fraud of the agent, the principal who conferred authority upon the agent must suffer the loss rather than the innocent third party. This the principal may generally avoid by submitting to a rescission of the contract, and restoring what he may have received as the fruit of the agent's bad faith. To thus bind the principal by the fraud of the agent is not to bind him beyond the scope of the agency. In such case, the agent does not exceed his authority, but perpetrates a fraud in the exercise of his authority to accomplish the object of the agency, and in such case the principal is liable for the fraud, although he may not have directed it nor had knowledge of it. The fraud of the agent becomes the fraud of the principal as to third parties. *Eilenberger v. Protective Mut. Fire Ins. Co.*, 89 Pa. St. 464; *Tagg v. Tennessee Nat'l B'k*, 9 Heisk. (Tenn.) 479; *Reynolds v. Witte*, 13 S. C. 5; S. C., 36 Am. R. 678.

The holding in the case of *Law v. Grant*, 37 Wis. 548, is summed up in the syllabus as follows: "If an agent effects a sale of land of his principal by false representations or other fraud, without the authority or knowledge of the principal, the latter is chargeable with such fraud in the same manner as if he had known or authorized it. If the vendor of land knows *when he effects the sale*, that the purchaser has been in-

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duced to buy by the false and fraudulent representations of a third person, he is responsible for the fraud, though such third person was *not his agent*."

In the case of *Bennett v. Judson*, 21 N. Y. 238, the court said: "There is no evidence that the defendant authorized or knew of the alleged fraud committed by his agent Davis, in negotiating the exchange of lands. Nevertheless, he can not enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may no doubt rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing he can not claim immunity on the ground that the fraud was committed by his agent and not by himself. This is elementary doctrine."

See, also, the case of *Nelson v. Cowing*, 6 Hill, 336, where it was held, overruling the case of *Gibson v. Colt*, 7 Johns. 390, that an agent authorized to sell an article is presumed to possess the power to warrant its quality and condition unless the contrary appear; and this, whether the agency be general or special; and that the principal will, in such case, be affected by the *fraudulent representations* of the agent in making the sale. See, also, Story Agency, section 452 and note, and cases there cited.

As we have said, the evidence shows clearly that Osborn was acting for Wolfe. To say the least, he represented him as agent in bringing about and consummating the trade. His acts and representations, in the way of inducing Pugh to make the trade, became the acts and representations of Wolfe. He could not delegate authority to Trueblood to act for Wolfe, without his authority or sanction, but he could use him as a means of deceiving Pugh, and this he did. It was proper, therefore, to prove all of Osborn's acts and representations to Pugh and in his presence, and the acts and

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declarations of Trueblood in the presence of Pugh and Osborn. What Trueblood did and said in the presence of Pugh and Osborn, became the acts and declarations of Wolfe the principal. The acts, declarations and representations by Osborn and Trueblood were in the one endeavor to induce Pugh to forego an examination of Wolfe's land, and enter into the trade. The buying of the watch by Osborn, and the giving of it to Pugh by Trueblood, were clearly a part of the same scheme to prevent an inspection of Wolfe's land by Pugh. These several acts, the declarations, and representations by Osborn and Trueblood to Pugh, or in his presence, were competent evidence against Wolfe. They were the means by which the trade was effected, and by which Wolfe got from Pugh his farm without adequate consideration.

A part of the testimony of Brodus, Joyce, Bunch and Spilkey consisted of statements that Osborn told them that he was selling the land for Wolfe. Appellant contends that these statements tended to prove the agency of Osborn, or a conspiracy between the parties, and that for either purpose they were incompetent, as neither an agency nor a conspiracy can be proven, as against an absent party, by the declarations of an alleged agent or conspirator. This is doubtless the rule of law well settled, and if objections and exceptions to the testimony had been properly made and saved, they would challenge serious consideration. But we think that as the objections were made and exceptions saved, the court below did not err in admitting the testimony, and that the exceptions saved present no available error. In each case, the witness was asked whether or not he had had a conversation with Osborn, and, upon answering that he had, was requested to give it. At this point, appellant interposed his objections, stating, with other grounds, that the declaration of an alleged agent or conspirator is not competent to prove the agency or conspiracy. These objections were overruled, and appellant excepted. At this juncture, the trial court did not and could not know what the testimony of the wit-

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nesses might be, and hence did not err in overruling the objections. The witnesses were allowed to give the conversations with Osborn, and, as they proceeded, stated what he had said about selling the land for Wolfe. No objections were made to these statements, nor to any other statements, as they came from the witnesses. After they had all testified, appellant moved the court to strike out and withdraw from the jury all conversations with and statements and declarations by Osborn in the absence of Wolfe, because no agency nor conspiracy had been proven. This motion was properly overruled.

In the first place, an agency at least had been clearly established. In the second place, as we have said, the jury might well have found from the evidence that there was a conspiracy to cheat and defraud Pugh. And, in the third place, the motion included all of the conversations of Osborn with Pugh, some of which was clearly competent. If any of the evidence was competent, it was not error to overrule a motion to strike out the whole of it. These observations apply equally to all of the evidence which appellant contends in argument was incompetent.

It is also urged in argument that some of the statements by Spilkey were of conversations with Osborn after the trade was consummated, and his agency hence at an end. Here again the objections were made in the same way, and are not, therefore, available. It may be proper to say, however, that the evidence tends to show that the agency had not terminated, as Osborn and Wolfe had not yet closed up the transaction by a division of the proceeds, which they afterwards made at a bank. See *Adams v. Davidson*, 10 N. Y. 309.

What we have said as to the competency of the acts of Osborn and Trueblood, and their declarations and representations to Pugh, is equally applicable upon the theory of a conspiracy to defraud Pugh. Such acts, declarations and representations by an alleged conspirator are not binding upon absent parties, and hence are not competent evidence against

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them, until there has been proof of a conspiracy. When that is established, such acts, declarations and representations become competent evidence against all parties shown to have been connected with the conspiracy, if in furtherance of that object. Without extending this opinion, it is sufficient to say that in our opinion the evidence of a conspiracy was such as to make the acts, declarations and representations of Osborn and Trueblood competent evidence against appellant. See Whart. Ev., section 1205. And whether we regard the case as one of agency on the part of Osborn, or one of conspiracy, the evidence is such that we can not reverse the judgment upon the weight of the evidence. There might have been an agency, and also a conspiracy to defraud Pugh; the two are not at all inconsistent. A conspirator, in a certain sense, acts as the agent of his co-conspirators.

Appellant's interpretation of the sixth instruction is not a fair one, for the reason that he dissects it into parts, and assails the parts separately. An instruction, as we have many times decided, is to be taken as a whole. Taken as a whole, this instruction states as a legal proposition that all who accede to, concur in, and willingly and knowingly become parties to and further a conspiracy, are parties to it, without proof of further or previous agreement to concur in and further it. Thus interpreted, the instruction states the law correctly. *Daniels v. McGinnis*, 97 Ind. 549; *People v. Mather*, 4 Wend. 229.

Many objections are urged to other instructions given by the court, all of which we have carefully examined and considered, and conclude that they are not such as would justify a reversal of the judgment. It would extend this opinion to an undue length to follow counsel in their elaborate argument and meet each objection separately. It is manifest that some of the instructions did not influence the jury to the prejudice of appellant. The damages, for example, as returned by the jury, are less than the difference between what Pugh asked for his land and the value of appellant's land; and less, also,

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than the difference between the value of Pugh's land and the land of appellant.

The fourth and fifth instructions upon the question of fraudulent representations as to the value of land may not state the rule correctly under the decisions of this court, but we do not think that the judgment should be reversed on that account. The statute commands that this court shall not reverse a judgment where it shall appear that the merits of the cause have been fairly tried and determined in the court below. R. S. 1881, section 658. Under this section it has been many times held that if the verdict and judgment are right upon the evidence, the judgment will not be reversed because of erroneous instructions. *Burton v. Calaway*, 20 Ind. 469; *Wood v. Ostram*, 29 Ind. 177; *Roberts v. Nodwift*, 8 Ind. 339; *Lafayette, etc., R. R. Co. v. Adams*, 26 Ind. 76; *Brooster v. State*, 15 Ind. 190. In our judgment the verdict and judgment in this case are clearly right upon the evidence, and the rule of the statute and decisions should be applied in support of the judgment.

Of the instructions asked by appellant the court refused some, gave some as asked, and others with modifications. We have carefully examined all of them, and noted the argument of counsel, and are not convinced that any error was committed which would justify a reversal of the judgment; nor that appellant suffered any injury by the action of the court of which he can complain. So far as the instructions refused state the law applicable to the evidence correctly, they are covered by instructions given by the court, and as applicable to the evidence in the case, we think that the modifications were properly made.

Having found no error in the record for which the judgment should be reversed, it is affirmed, with costs.

Filed April 22, 1885.

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No. 11,952.

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101	310
128	57
101	310
141	331
101	310
166	107

PLEADING.—*Reference to Another Paragraph.*—*Supreme Court.*—Where, in the Supreme Court, no question is made upon the pleadings, and the question to be decided in that court relates to the sufficiency of the evidence, the insufficiency of a paragraph of pleading, because of its reference to and adoption of part of the allegations of another paragraph, will not avail the appellant.

MORTGAGE.—*Foreclosure.*—*Description.*—*Extrinsic Facts.*—Where insufficiency of the description of land in a mortgage may be aided, and foreclosure may be authorized, without reformation, by showing extrinsic facts, such extrinsic matter must be such as does not contradict the mortgage or produce a description of other property than that described therein. It must merely explain the description in the mortgage, and point out the property by the means of identification indicated in the mortgage.

SAME.—*Construction of Description of Premises.*—The part of a deed which describes the premises conveyed or mortgaged should be liberally construed, with a view to make the deed available.

SAME.—*Complaint.*—*Single Cause of Action.*—A mortgage is a single cause of action, and in a complaint to foreclose it, however many notes or instalments it secures, a single paragraph only is necessary.

From the Grant Circuit Court.

H. Brownlee, J. A. Kersey and L. D. Baldwin, for appellants.

A. Steele and R. T. St. John, for appellee.

BLACK, C.—The appellee sued the appellants, who have assigned as error the overruling of their motion for a new trial, in which the causes stated were that the finding was contrary to law; that the finding was not sustained by sufficient evidence, and that the amount of the plaintiff's recovery was too large.

The appellee sought the foreclosure of two mortgages executed by the appellants, Audley M. Hannon and his wife, Sarah E. Hannon. One of the mortgages, that declared on in the first paragraph of the complaint, was executed on the 19th of June, 1869, to the appellee, to secure a promissory note of that date, due five years thereafter, given by said husband to the appellee.

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The first paragraph alleged, amongst other things, that the defendants, on, etc., executed to the plaintiff a mortgage, thereby conveying to him "the lands therein described, to wit, the west half of the northwest quarter of section 11, in township 23 north, in range 8 east, in Grant county, Indiana, containing ninety and $\frac{11}{100}$ acres, more or less; and the plaintiff avers that at the same time and place and in the same mortgage, the said defendants undertook to convey to said plaintiff the additional and following described lands, to wit: Also, fifty-nine acres off of the west side of the east half of the northwest quarter of said section, described as beginning at the northwest corner of said east half of said northwest quarter of section 11, and running thence east thirty-nine rods to a stone; thence south two hundred and twenty-eight and one-fifth rods to the Mississinewa river; thence down said river to the southeast corner of said west half of said quarter section; thence north to the place of beginning; and that the whole of said tract is in township 23 north, in range 8 east, in Grant county.

Plaintiff avers that in drafting said mortgage a mistake was made in said description by the person who drew the same, in this, that a part of said description was not written in the said mortgage; that the description written therein is as follows: "Also the west part of the northeast half of the northwest quarter of section 11, township 23 north, in range 8 east, and running thence east thirty-nine rods to a stone; thence south to the river; thence running with the river to the southeast corner of the west half of the northwest quarter of section 11, town 23, range 8 east, containing fifty-nine acres, more or less."

It was alleged that the description should have been written as first herein set out, and that the mistake in not so writing was a mutual mistake of the parties and the draftsman. The plaintiff asked the correction and reformation of this mortgage and its foreclosure.

The description in the copy of the mortgage exhibited

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with this paragraph corresponded with the description in the mortgage exhibited with the second paragraph, except in the use of the word "north" before the words "east half of the northwest quarter."

The second paragraph declared upon another mortgage executed to one Bond, February 13th, 1869, to secure four promissory notes of that date given by said husband to said Bond, one of which, due in 1873, with so much of the payee's interest in the mortgage as secured it, was assigned to the appellee in 1878. In this paragraph it was alleged, with other things, that, on, etc., the defendants executed a mortgage to said Bond, thereby conveying to him "the real estate therein named, and being the same real estate described in the first paragraph of this complaint, to secure," etc. In the copy of the mortgage filed with this paragraph as an exhibit, the real estate was described as follows: "The following real estate in Grant county, in the State of Indiana, to wit, the west half of the northwest quarter of section 11, in township 23 north, in range 8 east, containing ninety acres and $\frac{11}{100}$ acres, more or less; also, the west part of the east half of the northwest quarter of section 11, township 23 north, in range 8 east, and running from thence east thirty-nine rods to a stone; thence south to the river; thence running with the river to the southeast corner of the west half of the northwest quarter of section 11, township 23, range 8; thence to the place of beginning; containing fifty-nine acres, more or less."

Another paragraph, numbered the fourth, alleged the assignment, in 1878, by said Bond to the plaintiff of another of said four notes, the one due in 1871. It was alleged in this paragraph that, "on the 13th of February, 1869, the said defendants executed and delivered to one Levi L. Bond their mortgage, thereby conveying to said Bond the land therein described, as security," etc. A copy of the mortgage was referred to as being "herewith filed and made part of this complaint."

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No attempt was made, either in the second paragraph or in the fourth, to allege any mistake in the mortgage executed to Bond, and the reformation of this mortgage was not asked.

Issues were formed, and the court found for the plaintiff upon all these paragraphs, and in its finding stated, with other things, that the appellants, on the 19th of June, 1869, executed to the appellee a mortgage on real estate described in the finding, the description thus given being that set out in the first paragraph of the complaint as the description of the real estate which the defendants by their mortgage of that date undertook to convey to the plaintiff. It was also found that on the 13th of February, 1869, the appellants executed to said Bond a mortgage on the same land.

It appeared from the evidence, that by each of the mortgages the parties thereto intended that a certain farm should be mortgaged thereby, the mortgage executed to Bond being given to secure the purchase-money of the land mortgaged, and that executed to the appellee being given for money borrowed of him by said husband and used by him to pay a part of the purchase-money of said land, a correct description of which was set forth in the first paragraph of the complaint and in the court's finding.

Upon some questions involved in the trial, which we do not specially mention, there was conflict of testimony. The only question not disposed of by application of the rule that we can not pass upon the weight of evidence is, whether, under the complaint, there could be a finding that by the mortgages declared on the real estate described in the finding was mortgaged.

As was said in *Davis v. Cox*, 6 Ind. 481, it is not what the complaint alleges simply, without proof thereof, nor what the plaintiff proves without having alleged it, that is the measure of his remedy, but what he alleges and proves. *White v. Hyatt*, 40 Ind. 385. It is a familiar rule that each paragraph of a pleading must be complete within itself, and one paragraph can not be aided as to the allegation of material facts

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by mere reference therein to the allegations of another paragraph. *Entsminger v. Jackson*, 73 Ind. 144. But where no question is made upon the pleadings, and the question to be examined by this court relates to the sufficiency of the evidence, the insufficiency of a paragraph of pleading, because of its reference to and adoption of part of the allegations of another paragraph, will not avail the appellant. *Larsh v. Test*, 48 Ind. 130.

If a mistake was well pleaded in the first paragraph of the complaint, no mistake of fact in the execution of the mortgages or of either of them was proved. It does not appear but that the words intended by the parties were used. As shown in evidence, the mortgage executed to the appellee, upon which the first paragraph of the complaint was based, did not contain the word "north" before the words "east half," as alleged in that paragraph and as the exhibit indicated. Counsel for the appellee speak of the appearances of this word "north" in the record as clerical mistakes. If the record presented to us is incorrect, this is a fault of counsel. But we think that upon the introduction of the mortgage in evidence, this variance might have been amended, and that the evidence can not for this reason be regarded as insufficient to support the finding.

Let us first consider whether the evidence was sufficient to sustain the finding, if the first and second paragraphs had constituted the whole complaint. If the description of the premises in the mortgages (and it was in both like that in the exhibit of the second paragraph of the complaint) showed ambiguity which rendered the mortgages void and ineffectual to convey the premises, then, unless upon a proper showing by pleading and evidence of mistakes the mortgages were corrected and reformed, the evidence was insufficient. But the description of the premises in a mortgage may, in a particular case, be sufficient for the foreclosure of the mortgage without reformation thereof, and yet not thus sufficient without the averment in the complaint of some extrinsic fact or

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facts, by proof of which under such averment the incomplete description in the mortgage may be rendered complete, and the court in its finding and decree may designate the property by such complete description, so as to enable the sheriff with the help of a surveyor to find the land and exactly ascertain its boundaries. *Whittelsey v. Beall*, 5 Blackf. 143; *English v. Roche*, 6 Ind. 62; *Struble v. Neighbert*, 41 Ind. 344; *Halstead v. Board, etc.*, 56 Ind. 363; *Craven v. Butterfield*, 80 Ind. 503; Jones Mort., section 1462.

To enable the court to enforce the mortgage upon particular land under the averment of extrinsic facts, the extrinsic matter must not contradict the mortgage or produce a description of other property than that described therein, but it must merely explain the description in the mortgage and point out the property by the means of identification indicated in the mortgage; that the mortgage may not be void, it must furnish such means of identification. It should be apparent that the mortgage and the complaint alleging extrinsic facts designate the same property.

If a monument be mentioned as a part of the description in a mortgage, but the relative position of such monument be not certainly designated, and the designation of its position exactly would render the description complete, the mortgage is not void; for an averment in the complaint to foreclose it showing the position of the monument would not contradict the mortgage, but, by means indicated in the mortgage, would show a description which would appear on its face to indicate the property described in the mortgage, and, under such an averment, parol evidence would be admissible to identify the monument. Whart. Ev., section 942; 3 Washb. Real Prop., ch. 5, section 4, cls. 52, 53; *Brown v. Anderson*, 90 Ind. 93.

Some effect will be given to a mortgage, if possible; for it will not be presumed that the parties meant it to be a nullity. *Gano v. Aldridge*, 27 Ind. 294.

The part of a deed which describes the premises conveyed or mortgaged should be construed with the utmost liberality,

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and the deed should not be held void for uncertainty, if by any reasonable construction it can be made available. It is the office of the description to furnish the means of identification, and if the intent of the parties can, by any possibility, be gathered from the language used, it will be effectuated. *Peck v. Mallams*, 10 N. Y. 509; *Key v. Ostrander*, 29 Ind. 1; *German Mut. Ins. Co. v. Grim*, 32 Ind. 249 (2 Am. R. 341); *Rucker v. Steelman*, 73 Ind. 396.

Looking, with such purpose, at the descriptions, in the mortgages in suit, of the portion of the premises said therein to be fifty-nine acres, more or less, and considering in connection with said descriptions the statement in the complaint that the stone mentioned in the mortgages is east of the northwest corner of the east half of the northwest quarter of the section designated, the uncertainty of the descriptions is sufficiently removed to enable the court to effectuate the mortgages. The parties designated the stone as a monument, and set out sufficient other matter of description to locate the land by proceeding in accordance therewith from that monument. There was no ambiguity in their minds as to the monument, and if its relative position is ascertained *aliunde*, there is no uncertainty in the description sufficient to defeat the intention of the parties.

With this understanding, the proof was sufficient under the first and second paragraphs of the complaint.

Now, as to the fourth paragraph. It showed that the plaintiff was the owner of another of the four notes secured by the Bond mortgage sued on in the second paragraph, and it made the copy filed with that paragraph its exhibit.

For the foreclosure of this mortgage as to all the notes secured thereby that the plaintiff owned, only one paragraph was necessary. The mortgage, as to all his interest in it, constituted one cause of action. The case was practically conducted as if the fourth paragraph had been a part of the second, or supplementary thereto, and the same result was reached as would have been properly arrived at as to the Bond mort-

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gage if there had been but one paragraph thereon. No question is before us as to the sufficiency of the pleadings, or as to the admission of evidence. The statute provides that this court shall not reverse a judgment, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below. R. S. 1881, section 658.

It sufficiently appears upon the record before us that a just result was reached, and we are of the opinion that the judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

Filed Feb. 14, 1885; petition for a rehearing overruled April 8, 1885.

No. 11,621.

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PLEADING.—*Demurrer*.—*Incapacity to Sue*.—A demurrer to a complaint for the *second* statutory cause, "that the plaintiff has not legal capacity to sue," has reference only to some legal disability of the plaintiff, such as infancy or idiocy, and not to the fact that the complaint fails to show a right of action in such plaintiff.

SAME.—*Demurrer for Want of Facts*.—*Cause of Action in Plaintiff*.—A demurrer to the complaint for the *fifth* statutory cause (section 339, R. S. 1881) calls in question not only the sufficiency of the facts stated in the complaint to constitute a cause of action, but the right of the plaintiff to maintain the action.

PERSON OF UNSOUND MIND.—*Annulment of Marriage*.—*Incapable Party*.—*Guardian*.—*Complaint*.—Under section 1025, R. S. 1881, when either of the parties to a marriage is incapable, from unsoundness of mind or want of understanding, of contracting such marriage, a suit for the annulment of such marriage can be maintained upon a complaint in the name only of the incapable party, and not in the name of his or her guardian.

From the Clinton Circuit Court.

E. A. Greenlee and I. W. Parsons, for appellant.

A. E. Paige and S. O. Bayless, for appellee.

101	317
152	598
101	317
157	268
101	317
160	212

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Howk, J.—The first error assigned by the appellant, Carrie Pence, upon the record of this cause, is the overruling of her demurrer to appellee's complaint.

In his complaint the appellee, as guardian of Aaron W. Pence, a person of unsound mind, alleged that theretofore, at the ——— term of the court below, he was duly appointed the guardian of Aaron W. Pence, who was then and there adjudged by the court to be of unsound mind; that appellee qualified and entered upon the discharge of his duties as such guardian; that Aaron W. Pence was of unsound mind and was extremely weak, physically and mentally, to such an extent as to render him wholly unfit to care for himself, or to comprehend and understand the effect and purport of any contract he might enter into or be induced to make; that the defendant Carrie Spriggs was a woman about forty or forty-five years of age; that, on July 30th, 1883, Carrie Spriggs represented to the clerk of the Tippecanoe Circuit Court that she was a *bona fide* resident of Tippecanoe county, and procured from such clerk a marriage license, authorizing her marriage to and with Aaron W. Pence; that on Sunday, September 9th, 1883, Carrie Spriggs and Aaron W. Pence procured a carriage and went to the place about two miles in the country, away from the influence and control of the guardian and relations of Aaron W. Pence, and under the pretended authority of such marriage license, and by the services and ceremonies performed by a minister of the gospel, a pretended marriage ceremony was performed, having for its primary object and purpose the union of Aaron W. Pence and Carrie Spriggs in the holy bonds of matrimony; that Carrie Spriggs had ever since claimed to be the wife of Aaron W. Pence, and claimed an interest in his property and her support from the same, as if she were his lawful wife, and had assumed the name of Carrie Pence, by which name the appellee asked that she be notified of this proceeding, as well as by her lawful name of Carrie Spriggs, the two names representing one and the same person; that Aaron W. Pence

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was made a defendant, that he might be notified of the proceeding and answer thereto, if he had any other interest therein than that represented by his guardian, the appellee; that Carrie Spriggs, well knowing the feebleness and weakness of Aaron W. Pence's mind, influenced and persuaded him to enter into such pretended marriage relation with her, without the knowledge or consent of his guardian. Wherefore, etc.

To this complaint, the appellant, Carrie Pence, demurred upon the following grounds: 1. That it did not state facts sufficient to constitute a cause of action; and, 2. That the appellee had not the legal capacity to sue.

It is clear, we think, that the second cause of demurrer does not present for decision the question which appellant's counsel manifestly sought to present thereby, namely: Whether or not the appellee, as the guardian of a husband of unsound mind, may maintain an action in his own name to obtain a decree annulling and setting aside the marriage of such husband? It has often been decided by this court, that a demurrer to a complaint assigning as cause, "that the plaintiff has not legal capacity to sue," has reference only to some legal disability of the plaintiff, such as infancy, idiocy or coverture, and not to the fact that the complaint fails to show a right of action in the plaintiff. *Dale v. Thomas*, 67 Ind. 570; *Dewey v. State, ex rel.*, 91 Ind. 173; *Traylor v. Dykins*, 91 Ind. 229. It was not shown by the complaint, in this case, that the appellee, Aughe, was incapacitated to sue, by reason of any legal disability.

The first cause of demurrer assigned by the appellant, however, presents not only the question of the sufficiency of the facts stated to constitute a cause of action, but a cause or right of action in the plaintiff. If the facts stated were sufficient to show that the marriage might be annulled at the suit of the husband, the question would still remain for decision, whether or not the legal guardian of the husband might institute and maintain, in his own name as guardian, a

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suit for the annulment of such marriage. The complaint is defective as to dates. It is nowhere alleged therein that Aaron W. Pence was adjudged to be of unsound mind, or that appellee was his guardian, before or at the time of his marriage to the appellant. It might, perhaps, be inferred from some of the allegations of the complaint, that he was under guardianship as a person of unsound mind at the time of his marriage, but such a fact ought to be averred, and not left to mere inference. In section 5325, R. S. 1881, in force since May 6th, 1853, it is provided: "The following marriages are declared void: * * * *Third.* When either party is insane or idiotic at the time of such marriage." In section 1025, R. S. 1881, in force since March 10th, 1873, it is further provided on the same subject, as follows: "When either of the parties to a marriage shall be incapable, from want of age or understanding, of contracting such marriage, the same may be declared void, on application of the incapable party, by any court having jurisdiction to decree divorces; but the children of such marriage, begotten before the same is annulled, shall be legitimate; and in such cases the same proceedings shall be had as is provided in applications for divorce."

This latter section of the statute is the only one, so far as we are advised, that authorizes such a suit or proceeding as the one at bar; and in the absence of such statutory provisions, it is very certain, we think, that no such suit or proceeding could be maintained. Under these statutory provisions the question arises, and, in so far as the sufficiency of the complaint is concerned, this is the controlling question in this case, can such a suit or proceeding be instituted or maintained by or in the name of any person, other than the person specified in the statute as "the incapable party?" We are of opinion that this question must be answered in the negative. As between the immediate parties, under the law, marriage is a civil contract; but, as between them and the State or organized society, marriage is more than a civil contract.

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It is a status or relation. *McCabe v. Berge*, 89 Ind. 225. With this status or relation courts can interfere only to the extent and in the manner prescribed by statute.

It is true, that under section 2551, R. S. 1881, the same powers are granted to guardians of persons of unsound mind as are granted by other laws to guardians of minors. But it is equally true that no power is expressly granted to the guardian of a minor, by any statute, to maintain such a suit in his own name, for or on account of his ward. It is certain, we think, that if a party to a marriage were incapable, from want of age, of contracting such marriage, the legal guardian of such party could not, in his own name as guardian, maintain the suit or proceeding authorized by section 1025 above quoted, for the annulment of such marriage. We conclude, therefore, that the facts stated in the complaint under consideration are not sufficient to constitute a cause of action in favor of the appellee as guardian, and against the appellant, Carrie Pence, and that, for this cause, her demurrer ought to have been sustained to such complaint.

This conclusion disposes of the case in hand, and we need not, therefore, consider now either of the other errors complained of by the appellant.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrer to the complaint.

Filed April 3, 1885.

No. 11,626.

101	321
165	547

MOSS v. THE STATE, EX REL. MANN.

DRAINAGE.—*Statute Construed.*—The act of 1881 concerning drainage, R. S. 1881, sections 4273-4284, was amended, but not repealed, by the act of 1883, but the latter controls the proceedings after it took effect.

SAME.—*Complaint.*—*Exhibits.*—Under the act of 1881 the assessment made by the commissioner charged with the construction of the work constitutes a lien on the land, and a copy thereof must be exhibited with the

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complaint; but where the amendatory act of 1883 was in force when the court acted upon the report of the commissioners, that report as approved and confirmed or modified by the court must be the exhibit, and in any case the notice recorded is not the proper exhibit.

From the Howard Circuit Court.

J. W. Kern, B. F. Harness, J. C. Blacklidge, W. E. Blacklidge and B. C. H. Moon, for appellant.

J. F. Elliott and L. J. Kirkpatrick, for appellee.

FRANKLIN, C.—Appellee commenced this suit against appellant to collect a ditch assessment. A demurrer was overruled to the complaint. The defendant refused to answer over, and judgment was rendered for the plaintiff.

The error assigned is the overruling of the demurrer to the complaint. The proceeding was commenced under the statute of 1881, and proceeded regularly under that statute to the filing of the report of the commissioners of drainage on January 12th, 1883.

In June, 1883, the court, in some respects, modified the report of benefits and damages, and approved and confirmed it as so modified, ordered the drain to be constructed, and appointed appellee, one of said commissioners, to superintend the work. He had the proper notice recorded, and made an assessment by instalments to pay for the construction of the drain. The objections to the complaint are:

First. That the act of 1881, under which the proceedings were commenced, was repealed by the act of 1883, which took effect March 8th, 1883.

Second. That a copy of the assessment is not made a part of the complaint, by exhibit or otherwise.

The amendment of 1883 contains no repealing clause of the statute of 1881, and can by implication only repeal such parts thereof as are in conflict with the amendment. The amendment is not an independent statute covering the whole subject of drainage, and intended to be a substitute for the act of 1881; but it is clearly intended to be an amendment to certain sections only, and as such the amended sections, as

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amended, became parts of the original act, and are to be enforced as such.

As an evidence of the fact that the Legislature did not intend that this amendatory statute should be an independent one, that it should be a substitute for the former, or that it should repeal by implication the former, the 8th section of the amendatory act provides that "this act as to the time in which a remonstrance may be filed, shall relate to all proceedings now pending, when a contract for the construction of the drain has not been made."

The proceedings in this case, up to the time the amendatory act of 1883 went into force, are to be controlled and governed by the act of 1881; after the amendment took effect they are governed by the same act as amended. We think the first objection to the complaint is not well founded.

The amendatory act has produced some confusion in the practice, as to what is the foundation of an action to collect assessments, and what should be made a part of the complaint, by exhibit or otherwise.

There are a number of cases in this court holding that a copy of the assessment should be made an exhibit to the complaint. The act of 1881, before amendment, and since amendment, requires two assessments to be made—the assessment of the benefits and damages by the drainage commissioners, and the assessment of instalments to be collected by the working commissioner—under which the question arises, Which one of these assessments is to be regarded as the foundation of the action? We answer, the one that creates the lien upon the land.

Under the act of 1881, as originally passed, the 4277th section, R. S. 1881, provides that the commissioner charged with the execution of the work shall assess from time to time upon the lands benefited, ratably upon the amount of benefits as adjudged by the court, such sums of money as may be necessary therefor, etc.

The 4278th section provides that "The amount of assess-

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ments so made by such commissioner shall be a lien upon the lands so assessed, from the date of recording notice of the establishing of the work by the court."

Under this statute, as it originally stood, this court has held that the assessment made by the commissioner who has charge of the work creates the lien, and must be made a part of the complaint. *Crist v. State, ex rel.*, 97 Ind. 389; *Roberts v. State, etc.*, 97 Ind. 399.

But the 5th section of the amendatory act of 1883, Acts 1883, p. 179, amends the above 6th section of the act of 1881, and which amended section reads as follows: "The filing of the petition shall be deemed notice of the pendency of the proceedings to all persons whose lands are named in the petition, and the filing of the report of the commissioners locating the work and fixing the amount of assessments, shall be deemed notice of the pendency of the proceedings to all persons whose lands are named therein, and not named in the original petition, and the amount of the assessment, as made or approved and confirmed by the court, shall be a lien upon the lands so assessed, from the time of filing the petition," etc.

By this amended section the report of the commissioners of drainage, as approved and confirmed by the court, creates the lien upon the land. The provision for the subsequent assessment by the commissioner having charge of the work, by apportioning the amount of the lien that shall be collected by instalments, affects the remedy in enforcing the lien, and does not create it; hence, while this latter assessment must be averred in the complaint, it is not the foundation of the action, and need not be made an exhibit in the complaint; and the same may be said of the notice required to be recorded by the commissioner having charge of the work. But as the report of the drainage commissioners, as approved and confirmed by the court, creates the lien, it becomes the foundation of the action, and must be made a part of the complaint.

In the case under consideration, while the report of the drainage commissioners was filed in January, 1883, under the

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act of 1881, it was approved by the court in June, 1883, under the amendatory act of 1883, and it is the amended act that must control this question, and not the original one. See the case of *State, ex rel., v. Myers*, 100 Ind. 487, and authorities therein cited.

In the case under consideration the complaint avers the facts of the filing of the petition, notice, its reference to the drainage commissioners, their report of benefits and damages, its modification, approval and confirmation as modified by the court, and alleges the amount assessed on defendant's lands, the appointment of appellee as one of the commissioners to superintend the work, his having notice of the assessment recorded, and that he assessed instalments to be paid.

The only thing made a part of the complaint, as the foundation of the action, is the notice of the assessment made by the commissioners of the benefits as modified by the court, a copy of which is made an exhibit and filed with the complaint.

Under the statute in force at the time, the lien was created before the notice was recorded, and the notice can not be the foundation of the action. Although it should be averred as a necessary step in the remedy to enforce the lien, it can not supersede and dispense with the necessity of making the assessment of benefits and damages by the drainage commissioners a part of the complaint, by exhibit or otherwise. See the case of *State, ex rel., v. Myers, supra*.

It may be said that this notice contained a copy of the assessment of benefits. If that be true, then the copy in the complaint was a copy of a copy, which could not be admissible. The copy in the notice says nothing about damages, and we can not infer that it is a true copy of the original assessment; but this substitute for furnishing a copy of the original can not be held sufficient. We are forced to hold that the original assessment made by the drainage commissioners, as approved and confirmed by the court, is not made a part of the complaint, and for which omission the complaint

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must be held bad. The court erred in overruling the demurrer to the complaint.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded, with instructions to the court below to sustain the demurrer to the complaint, and for further proceedings.

Filed March 20, 1885.

No. 12,087.

JUSTICE v. THE CITY OF LOGANSPORT.

TAXES.—*Levy of, by Municipal Corporations.—Precedence of Lien of State, County and City Taxes.*—Municipal corporations in levying taxes are instrumentalities of government, and taxes levied by them are, in legal effect, levied by the State, so that the lien for such taxes is of equal rank and priority to taxes levied for State or county purposes.

SAME.—*Purchasers at County Sale for Taxes.—Lien of City Taxes.*—A purchaser at a tax sale made by the county officers takes the land subject to the lien for city taxes existing thereon, if the land is of sufficient value to pay all taxes, but, if the land is not of sufficient value to pay all taxes, then the sale first rightfully made will divest the lien for the other taxes.

From the Cass Circuit Court.

D. C. Justice, for appellant.

J. C. Nelson and Q. A. Myers, for appellee.

ELLIOTT, J.—The appellant foreclosed a mortgage executed to him by Jacob J. Puterbaugh, and acquired title under the sale made on the decree. In 1877 the city of Logansport assessed taxes against the real estate embraced in the mortgage amounting to \$600. At the time the taxes for 1877 accrued Puterbaugh was the owner of the property, and was also the owner of \$10,000 worth of personal property subject

101	326
120	151
101	326
141	248

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to seizure for the taxes assessed against him. State and county taxes were assessed against the property for the years 1877, 1878 and 1879, and in the latter year the property was sold to pay the delinquent and current State and county taxes. The appellant was the purchaser at the sale, and received a deed in due course of law. He seeks by the present suit to restrain the city from enforcing the taxes assessed by it against the real estate bought by him at the sale for State and county taxes.

The theory of the appellant is that the title acquired through the sale made for State and county taxes swept away all liens of the city, and vested in him the property discharged from all liens for municipal taxes.

This theory is constructed on an unsubstantial foundation. Taxes levied by a municipal corporation are levied for a public purpose and by public officers. A municipal corporation is part of the government; it is a governmental organization, invested with the powers of government over a designated locality. One of the oldest as well as one of the best definitions of a municipal corporation is, "an investing the people of the place with the local government thereof." *Cuddon v. Eastwick*, 1 Salk. 193. Cities are much older governmental institutions than counties, and they were influential agencies in securing stable and liberal government centuries before counties were organized. Robertson says: "The institution of cities into communities, corporations, or bodies politic, and granting them the privilege of municipal jurisdiction, contributed more, perhaps, than any other cause to introduce regular government, police, and arts, and to diffuse them over Europe." Chancellor Kent and Judge Dillon accept as correct De Tocqueville's theory, that municipal corporations are important governmental institutions, and essential to the preservation of free government. 2 Kent Com. (12th ed.), 275; 1 Dillon Munic. Corp. (3d ed.), section 9, n. 2. The chancellor says: "Public corporations are such as are created by the government for political purposes, as counties,

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cities, towns and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good." Counties do not, therefore, rank higher than cities; they are not as ancient; they are not more important instrumentalities of government, nor have they more comprehensive powers. It is not possible, therefore, to successfully maintain that taxes for county purposes take precedence of taxes levied by a city pursuant to legislative authority. It might with quite as much reason be affirmed that taxes levied by a city have precedence of taxes levied by a county as to assert the contrary. The position which best comports with reason and authority is this: There is no difference in priority, and a purchaser at a tax sale made by the county authorities takes the property subject to the city taxes, except, perhaps, in cases where it is made to clearly appear that the property is not of sufficient value to pay both city and county taxes. Where the property is not of sufficient value to pay both city and county taxes, then the sale first rightfully made divests the lien of the other governmental corporation.

The power to levy taxes is an attribute of sovereignty. Sovereign powers reside in the State, but the power to exercise the sovereign power of taxation may be delegated to a municipal corporation. In exercising this sovereign power the corporation invested with it is exercising a power of the State, and the taxes levied by it as an instrument of the government are, in legal effect, levied by the State. The State acts through one of its governmental subdivisions, and is the source of power. Whether the taxes are levied by a county or a city, they are taxes laid upon the people by the State, acting through its chosen representatives. This view is supported by the well reasoned case of *Denike v. Rourke*, 3 Bissell, 39, where it was said: "Municipal taxes are levied by virtue of the same general authority which levies and enforces a payment of State and county taxes—the municipal authorities acting by virtue of the power delegated to them by the State government, and a sale by municipal authority is, there-

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fore, essentially in all respects a sale by State authority." The question was presented in *Dennison v. City of Keokuk*, 45 Iowa, 266, as it is here, and it was held, as we hold, that the sale by the county officers did not divest the lien for city taxes.

Counsel for appellant makes some criticism upon the provision of the statute that city taxes are to be a lien "to the same extent as a judgment of a court of record of general jurisdiction;" but, in making this criticism, counsel pursues the illogical course of wresting the phrase from its connection and completely isolating it. Statutes are not to be thus treated. The context is to be read as an entirety, not subjected to a process of dissection. Treating the statute logically, there can be no doubt that it creates an enduring lien; it does, indeed, do this in very plain words, for it declares that "such lien shall be perpetual for all taxes due from the owner." It would be difficult, if not impossible, to have employed stronger words. It is obvious that a perpetual lien can not be destroyed by a sale made upon a lien of equal rank. The purchaser may, perhaps, secure a right to redeem from the city taxes, but he does not secure a title divested of the lien.

Judgment affirmed.

Filed April 3, 1885.

No. 11,821.

FAULKNER ET AL. v. BRIGEL ET AL.

101	329
152	625

ATTACHMENT.—Bond.—Parties.—Complaint.—The complaint of B. and S., on an attachment bond, averred a suit by the principal defendant against B. and S., and affidavit that B. was a non-resident, and an undertaking in attachment in the usual form, payable to the *defendants* for all damages *he* may sustain, etc., the issuing of a writ of attachment against B. and S., under which the sheriff seized and held a stock of goods which they owned as partners, until it was released by a delivery bond; that upon the attachment there was a judgment for B. and S.; that that proceeding was wrongful, to their damage.

Held, on demurrer to the complaint, that it was bad, because S. had no right of action jointly with B. or otherwise.

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From the Jay Circuit Court.

D. T. Taylor, J. M. Smith and T. Bailey, for appellants.

W. A. Thompson and J. W. Thompson, for appellees.

COLERICK, C.—This action was instituted by the appellees upon an attachment bond executed by the appellants. It appears by the averments in the complaint, that the appellant Faulkner, on the 21st day of May, 1879, commenced an action in the Jay Circuit Court against the appellees for damages, and with his complaint filed an affidavit for a writ of attachment, in which it was recited that the appellees were indebted to him in the sum of \$3,500, the nature of which indebtedness was fully stated; that the claim was just, and that he ought to recover said sum, and that the appellee Brigel was a non-resident of the State of Indiana, and also then filed a written undertaking, as required by the statute in such cases, executed by him, as principal, and by his co-appellants McKinney and Dougherty as sureties. The body of the undertaking, so filed, was as follows: "We undertake that the plaintiff shall duly prosecute his proceeding in attachment in this action, and pay to the *defendants* all damages which *he* may sustain if the proceedings of the plaintiff shall be wrongful and oppressive." On the filing of the complaint, affidavit and undertaking, the clerk of the court approved the undertaking, and issued a writ of attachment against *both* of the defendants in the action, although the affidavit upon which the writ was based related to *one* of the defendants only, and against whose property alone the writ should have been issued. Under and by virtue of the writ so issued the sheriff of Jay county, to whom it was directed, seized and took possession of a stock of goods owned by the defendants jointly as partners, and kept and detained the same, with the store-room in which the property was located, until the 29th day of May, 1879, when the defendants obtained a release of the property by executing to the sheriff a delivery bond therefor. It was averred in the complaint in

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this action, that the attachment proceeding was afterwards heard and determined by the court, and resulted in a finding and judgment in favor of the defendants therein, and it was also averred that said proceeding in attachment was wrongful and oppressive, for reasons therein stated, and that the appellees had been damaged thereby, etc. Wherefore they prayed judgment, etc.

Separate demurrers by each of the appellants to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action, were overruled, and thereupon the appellants McKinney and Dougherty severally filed separate answers to the complaint in two paragraphs each. These two answers were, in all respects, alike. The first paragraph of each was a general denial; while the second, purporting to be, as it was, a partial answer to the complaint, averred, in substance, that each of said two appellants had executed the undertaking, upon which the action was founded, as the surety of the appellant Faulkner, and that as to the appellee Sterling it was executed without any consideration whatever. Demurrers were sustained to the second paragraph of the answers.

The appellant Faulkner filed a separate answer to the complaint, in four paragraphs: 1. A general denial. 2. Averring, as a partial answer to the complaint, that the undertaking as to the appellant Sterling was executed without any consideration. 3. Averring, in substance, that he did not cause the writ of attachment to be issued against the property of the appellee Sterling, nor did he direct the sheriff to levy the same upon his property, or assist the sheriff in doing so, or consent to the same, and that neither he, nor any one else for him, made or filed with the clerk of said court an affidavit authorizing him to issue a writ of attachment against the property of Sterling, and that if any such property was seized by the sheriff under the writ which was issued, it was done without his direction, knowledge or consent, and that if the clerk issued a writ of attachment against

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the property of Sterling, it was without his direction, knowledge or consent. 4. Averring, in substance, the same facts as those set forth in the third paragraph. The third and fourth paragraphs were verified. Demurrers were sustained to each paragraph of the answer, except the first.

The issues formed were tried by a jury, who returned a verdict in favor of the appellees, and assessed their damages at \$497.24, upon which, over a motion for a new trial, judgment was rendered in favor of both of the appellees against all the appellants, from which they have appealed, and jointly and severally assign as errors the rulings of the court upon said several demurrers and on the motion for a new trial.

As the appellants have not discussed in their brief the error last assigned, it will be treated by us as abandoned by them. The principal question discussed by them, and submitted for our consideration is the sufficiency of the complaint.

It is settled, as a rule, by the decisions of this court, that where two or more join in an action, the complaint must show a right of action in favor of all the plaintiffs. *Lipperd v. Edwards*, 39 Ind. 165; *Maple v. Beach*, 43 Ind. 51; *Parker v. Small*, 58 Ind. 349; *Harris v. Harris*, 61 Ind. 117; *Hyatt v. Cochran*, 85 Ind. 231. In this case the complaint failed to show a right of action in the appellee Sterling on the undertaking which was the foundation of the action. No cause of action thereon existed in his favor. The only person who can maintain an action on such an undertaking is the defendant to the attachment proceeding. It is given for his benefit alone, and not for the indemnification of a third party whose property may be wrongfully seized by the officer executing the writ of attachment. *Drake Attachment*, section 162. Evidently, the undertaking, above set forth, which was the basis of this action, was carelessly prepared. It failed to show, with certainty, whether it was given to one or both of the appellees. In that respect it was, in form, defective, but the defect was cured by the statute. R. S. 1881, section 1221. It was given for the sole

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purpose of procuring an attachment against the property of Brigel alone, and, therefore, is to be treated as if executed to him only. See *Moore v. Jackson*, 35 Ind. 360. The defect in the form of the undertaking could not operate to extend the liability of those who executed it beyond that contemplated and assumed by them at the time of its execution. The clerk, under the affidavit for an attachment, which was filed with him, and to which we have referred, possessed no power to issue an attachment against the property of Sterling, and could not, and did not, by his unauthorized act in issuing it, render the persons who executed the undertaking liable thereon to Sterling for the damages which he thereby sustained. The sureties on an attachment bond can be subjected to liability under it only in reference to the particular writ for obtaining which it was given. Drake Attachment, section 165. The clerk who issued the attachment against the property of Sterling, in the absence of an affidavit authorizing its issuing, and the plaintiff in the action in which it was issued, if he procured the clerk to issue it, were trespassers, and liable, as such, to Sterling, if he was damaged thereby. See *Barkeloo v. Randall*, 4 Blackf. 476; Drake Attachment, section 118.

It follows from the views above expressed, that, in our opinion, Brigel alone could sue on the undertaking, and that no joint right of action thereon existed in favor of the appellees. The demurrers to the complaint for that reason should have been sustained.

It is sufficient to say with reference to the answers to which demurrers were sustained, that they were good enough for a bad complaint, and, therefore, the court erred in sustaining demurrers to them. For these erroneous rulings the judgment should be reversed.

PER CURIAM.—The judgment of the court below is reversed at the costs of the appellees, and the cause is remanded with instructions to the court to sustain the demurrers to

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the complaint, and for further proceedings in accordance with this opinion.

Filed April 10, 1885.

No. 11,664.

LORD ET AL. v. BISHOP ET AL.

BILL OF EXCEPTIONS.—*Short-Hand Reporter.*—Where a bill of exceptions purports to contain the evidence, and it appears in the form of a short-hand report written out, with the clerk's certificate that the manuscript was filed in his office, "furnished by I. K., short-hand reporter of said court," there is a substantial compliance with the statute upon the subject.

HUSBAND AND WIFE.—*Trust and Trustee.*—*Creditor's Bill.*—Where a husband receives money from his wife's mother to be invested in lands for the wife, and without her knowledge or consent takes title in his own name and holds it thirty-three years, and then, when in debt, puts the title in the wife, having, during that time, paid the taxes and by his labor cleared and improved the land, equity will not subject it to the payment of his debts.

From the Madison Circuit Court.

W. A. Cullen, B. L. Smith and D. Moss, for appellants.

J. O'Brien, for appellees.

MITCHELL, J.—The controversy between the parties to this record was considered by this court in the case of *Bishop v. State, ex rel.*, 83 Ind. 67, where the facts are fully detailed.

A second trial was had by the court, resulting in a finding and judgment for Mrs. Bishop, her husband having died after the former appeal was determined and before the second trial.

It is now argued that the finding of the court is not sustained by the evidence, and it is also contended that the court erred in some of its rulings during the progress of the trial, in respect to the admissibility of evidence.

The appellee makes the point that none of these questions are in the record, and that, therefore, this court can not examine them.

101	334
132	216
101	334
134	180
101	334
137	230
139	231

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It is not made to appear by direct statement in the record, that the short-hand reporter was duly appointed and qualified as such, but this may be inferred from the fact that it is certified by the clerk that the manuscript containing the evidence, which was filed in his office, was "furnished by Ira A. Kilbourne, short-hand reporter of said court," and inasmuch as this long-hand manuscript is incorporated in a bill of exceptions, duly signed by the judge, containing a statement that "this was all the evidence given in the above entitled cause," it fairly complies with the statutory requirement.

The appellant, a creditor of Ira Bishop, brought the action to set aside a conveyance which was made to Margaret Bishop of 160 acres of land in the year 1877. The evidence tended to prove that in the year 1844 Mrs. Bishop's mother, Mrs. McCann, delivered a sum of money to Ira Bishop, who was the husband of Margaret Bishop, and directed him to proceed to the "Indian Reserve" and enter two tracts of land adjoining each other, one for her daughter Margaret, the other for her son Patrick. Mr. Bishop received the money, proceeded to the "reserve," and entered two adjoining tracts of land containing eighty acres each, taking the title to one in his own name, and the other in the name of Patrick McCann. Subsequent to this Patrick McCann exchanged his eighty on the Indian Reserve, in Howard county, with Mrs. Bishop, for her interest in some lands in Rush county which she inherited from her mother. This was also conveyed to her husband. The husband paid no part of the consideration for either tract, and the evidence tended to show that his wife had no knowledge of the fact that the title to either tract was taken in his name.

It is inferentially conceded that as to the eighty acres obtained by the husband in exchange for his wife's interest in the Rush county lands inherited from her mother, the finding and judgment below was right, but it is argued that because the wife did not herself directly furnish the money to buy the first eighty, it therefore results that the finding and

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judgment is not sustained by the evidence. We do not concur in this view of the matter.

The evidence shows that Mrs. McCann furnished her son-in-law with money and instructed him to purchase the land for her daughter, his wife. It was intended that the wife should be the beneficiary in the fund so furnished. Taking the title in his own name made the husband as much her trustee as though he had received the money directly from his wife's hand. It was not for the husband to take to himself the benefaction which the mother intended to bestow upon her daughter, and his creditors can stand in no better attitude than he stood himself. *Brookville Nat'l Bank v. Kimble*, 76 Ind. 195; *Perry Trusts*, section 127.

That the husband spent his time and labor in clearing and improving the land, and that he paid the taxes, does not alter the case. The fact remains that it was the wife's land, and he could not improve it away from her.

That he did not repair the wrong originally done to his wife until he found himself involved in debt, can not defeat her right to enjoy her own property.

The husband of Mrs. Bishop became the administrator of his father's estate, and while administering upon that estate, he caused the land acquired as above detailed to be conveyed through a third person to his wife. It is probable that he was at that time in default as administrator. A judgment was recovered against him afterwards in favor of the estate, and we are now earnestly solicited to reverse the judgment of the court below, so that the loss of the estate may be made good.

However grossly the deceased husband may have violated his trust as administrator of his father's estate, and however imperative the duty which rested upon him to perform his obligation to those interested with him in it, the finding of the court below, which is also sustained by the evidence, shows that he violated a trust in taking the title to his wife's land in his own name, and having chosen to rectify that by

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causing what was equitably hers all the time to be conveyed to her, there is no rule of law or equity which would justify a court in taking her property to pay a debt of her husband's, however sacred. We find no error in the record.

Judgment affirmed with costs.

Filed April 7, 1885.

No. 11,404.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. HIXON.

JUDICIAL KNOWLEDGE.—*Counties*.—The courts of a State take judicial notice of the geography of its counties, their boundaries and the location of towns therein.

PRACTICE.—*Pleading*.—*Complaint*.—*Arrest of Judgment*.—Where, by intentment, a necessary fact not averred may be supplied, a complaint will be held good on motion in arrest of judgment.

From the Porter Circuit Court.

W. F. Stillwell and *W. Johnston*, for appellant.

D. J. Wile and *F. E. Osborn*, for appellee.

FRANKLIN, C.—Appellee sued appellant for the killing of a horse by the running of the cars on its railroad: Issue was formed by a general denial to the complaint.

The suit was commenced in Laporte county, and was transferred by change of venue to Porter county, where there was a trial by the court, which resulted in a finding for the plaintiff, and over motions for a new trial, and in arrest of judgment, judgment was rendered upon the finding.

The errors assigned are, overruling the motions for a new trial and in arrest of judgment, and in permitting the plaintiff to amend his complaint after the trial had closed and the judgment had been rendered.

The reasons for a new trial are, the finding is not sustained by sufficient evidence, and is contrary to law. It is insisted

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by appellant that the evidence fails to prove that the horse was killed in Laporte county.

The plaintiff testified that he lived with his father south of Westville, near the Louisville, New Albany and Chicago Railroad; that the horse was killed on the railroad upon his father's premises where they lived.

Mr. Crumpacker testified that he lived three miles south of Westville; he was acquainted with the horse; gave his age and pedigree; and that he saw him dead the next morning after he was killed.

We think this evidence sufficiently shows that the horse was killed on the railroad in the neighborhood of three miles south of Westville. This court will take judicial notice of the geography of the county, and the location of the towns therein. *Indianapolis, etc., R. R. Co. v. Case*, 15 Ind. 42; *Indianapolis, etc., R. R. Co. v. Stephens*, 28 Ind. 429; *Stultz v. State, ex rel.*, 65 Ind. 492; *Grusenmeyer v. City of Logansport*, 76 Ind. 549; *Wilcox v. Moudy*, 82 Ind. 219; *Terre Haute, etc., R. R. Co. v. Pierce*, 95 Ind. 496.

In accordance with the above cases this court will take notice that Westville is in Laporte county; and that the neighborhood three miles south of Westville, where the horse was killed, is also in Laporte county.

It is further insisted that there was no evidence tending to show that appellant owned, operated, or controlled the road on which the appellee's animal was alleged to have been killed.

The plaintiff testified that the animal was killed on appellant's road, and that several trains had for a long time daily passed over the road. We think this evidence tended to show not only that the appellant was the owner of the road, but that it controlled the running of the cars thereon.

Appellant further insists that there is no evidence showing that the road, where the horse entered upon it, was not securely fenced. The evidence shows that where the horse entered upon the track and was killed, the fence had been burned up for more than two months before the killing. If

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that was its condition, the road could not then have been securely fenced.

It is still further insisted that there was no evidence tending to prove that the horse had been struck by the locomotive or cars of appellant. The evidence shows that the horse was seen well, the day before he was killed, in the pasture feeding by the side of the road in the vicinity of where he was found the next morning dead by the side of the road, with a large "scar" on his right side, and otherwise badly bruised; that his tracks on the railroad grade showed that he had been running north on the west side of the grade, and that in attempting to cross the track he had been struck and knocked off to the west side.

This evidence justifies the inference that the horse had been struck and killed by the locomotive of a passing train. There is no error in overruling the motion for a new trial.

Under the motion in arrest of judgment, it is claimed by appellant that the complaint does not allege in what county the animal was killed. The title of the cause is laid in Laporte county, the suit was commenced there, and the complaint alleges that the defendant was operating its railroad through Laporte county, Indiana, and that the horse was then and there killed by the running of the cars on said road.

The defendant appeared to the case, formed an issue therein, and tried it without raising any objection to the complaint or the jurisdiction of the court. The proof sufficiently showed that the horse was killed in Laporte county, and in such cases the omission in the complaint of a direct averment, that the horse was killed in Laporte county, is cured by the finding of the court. *Louisville, etc., R. W. Co. v. Spain*, 61 Ind. 460; *Toledo, etc., R. W. Co. v. Stevens*, 63 Ind. 337; *Indianapolis, etc., R. R. Co. v. McCaffery*, 72 Ind. 294; *Louisville, etc., R. W. Co. v. Harrington*, 92 Ind. 457; *Pennsylvania Co. v. Rusie*, 95 Ind. 236.

It is further insisted that the complaint is insufficient, because it does not aver that the railroad was not securely fenced

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where appellee's animal entered upon the track. The allegation in the complaint being: "The right of way of said corporation and defendant, at the point where said horse thus strayed upon the track, as aforesaid, and at the point where said horse was killed, as aforesaid, was not securely fenced according to law."

To say that the right of way was not securely fenced was substantially saying that the road was not securely fenced. This objection is without merit, especially when first made after the trial and finding of the court. There was no error in overruling the motion in arrest of judgment.

Appellant in its brief has not referred to the specification of error in relation to amending the complaint after judgment; it is therefore considered as waived. We find no error in this record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed April 10, 1885.

No. 11,928.

BROWN ET AL. v. BROWN.

ADOPTION OF CHILDREN.—Order of Court.—Fraud of Adoptive Child.—A complaint seeking to have an order of court granting the prayer of a petition for the adoption of a child, and containing the averment, "that at the time of said adoption said defendant" (the adoptive child) "was eighteen years of age, and knew that said Preston Brown" (the adoptive father) "was a person of unsound mind, and that so knowing, and for the purpose of becoming the heir of said Preston Brown, and securing the property of said Brown, he gave his consent to said adoption, and permitted said adoption be made," does not show such fraud as will vitiate the order of the court.

SAME.—Judgment Ordering Adoption.—Collateral Attack.—A judgment of a court of competent jurisdiction, ordering the adoption of a child, fixes its status, is conclusive, and can not be collaterally attacked.

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SAME.—*Insanity of Adoptive Father.*—A judgment upon the petition of a person of unsound mind, praying the adoption of a child, is not void, and can only be set aside for cause.

SAME.—*Remedy of Natural Heirs.—Equity.—Diligence.*—Where natural heirs seek to set aside an order for the adoption of a child, their remedy is in equity; they must proceed promptly, and a delay of ten years will be fatal to their suit.

From the Hendricks Circuit Court.

T. J. Cofer, N. M. Taylor and J. H. Johnson, for appellants.
L. M. Campbell, for appellee.

ELLIOTT, J.—The material facts stated in the first paragraph of appellants' complaint are these: In May, 1873, Preston Brown asked and obtained an order of the Hendricks Circuit Court for the adoption of Edgar Boyd, and, in the same order, it was directed that the name of the child be changed to Edgar B. Brown. Preston Brown, the adoptive father, died in August, 1880, the owner of real and personal property, leaving no widow or natural children. The appellants are his brothers and sisters, and claim the property as his heirs. In April, 1883, they gave notice that they disaffirmed the proceedings adopting the appellee, on the ground that Preston Brown was of unsound mind at the time the proceedings were had.

The second paragraph of the complaint is essentially the same as the first, except that it undertakes to charge fraud on the part of the appellee. The charge is embodied in this language:

“Plaintiffs further say that the defendant had lived with said Preston Brown for several years immediately before, and was living with him at the time, the said pretended adoption was made, and that he well knew that the said Preston Brown was then a person of unsound mind; that at the time of said adoption said defendant was eighteen years of age, and knew that said Preston Brown was a person of unsound mind, and that so knowing, and for the purpose of becoming the heir of said Preston Brown, and securing the property hereinbe-

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fore mentioned before said adoption was made, he gave his consent to said adoption, and permitted said adoption to be made."

In our opinion, the two paragraphs are substantially the same, for the second does not contain a valid charge of fraud. The silence of the minor did not operate as a fraud upon the court. It is by no means every wrongful act of a litigant that will authorize the overthrow of a judgment. It is quite well settled that fraud will vitiate a judgment only when it is affirmatively shown that it was practiced upon the court. Pomeroy Eq. Jur., section 919; Freeman Judg., section 492; Bigelow Fraud, 170.

It is not necessary to inquire, or decide, what acts will constitute a fraud upon the court, for it does not appear that any fraudulent act at all was done. No obstacle to a full and free investigation was interposed, no deception was practiced, no artifices were resorted to, nor was anything done that misled either the court or the petitioner. The sum and substance of the averment is that the infant remained passive in the hands of the court. The court had ample authority to make a full and complete investigation, and, in the absence of averments to the contrary, we must presume that this investigation was made, and that the court satisfied itself that the petitioner was a proper person to adopt Edgar Boyd. The child has, in such cases as this, no part in the proceeding; the whole matter rests with the court, and it is for the court to make such an investigation as it deems proper. It can not be justly said that the silence of the child can operate to its prejudice, for it is the ward of the court, and the court is charged with the duty of making due inquiry before rendering a judgment consigning it to an adoptive father.

The judgment of the court fixes the legal status both of the adoptive parent and the child. *Paul v. Davis*, 100 Ind. 422; *Humphries v. Davis*, 100 Ind. 274. A judgment of a court fixing the status of a person, rendered in a matter where it has jurisdiction and upon the notice required by law, is con-

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clusive as against all collateral attacks by parties or their privies. This rule finds the most frequent illustration in those cases, and there are many of them, which hold that where a person is, in the manner provided by law, adjudged to be insane, the judgment is conclusive against parties and privies. This is so only where the law provides that the judgment shall fix the status, and is not so where the inquiry is for another purpose. *Goodwin v. State*, 96 Ind. 550. In the present case, the prime object of the proceeding for the adoption of a child is to fix its legal status, and it would be subversive of all principle to hold that the judgment in such a case could be set aside without due cause shown. Little good would be accomplished by such a proceeding if it were regarded as a mere matter of form.

A judgment against an insane person, as Mr. Freeman says, "is neither void nor voidable." Freeman Judg., section 152. The proper remedy in such cases is "to apply to chancery." The remedy of a person who asserts that an order directing the adoption of a child is invalid, because of the mental incapacity of the adoptive father, is in equity. This is the remedy in all cases of a kindred character (*Nealis v. Dicks*, 72 Ind. 374), and unquestionably is the remedy in such a case as the present. The appellants are, therefore, prosecuting an equitable suit. Their appeal is to the equity powers of the court, and it devolves upon them to affirmatively show that they have been prompt and diligent. Equity requires diligence from suitors. *City of Logansport v. LaRose*, 99 Ind. 117; *City of Logansport v. Uhl*, 99 Ind. 531. This rule operates in this instance to bar the successful prosecution of this suit. The unexplained delay of more than ten years prevents the maintenance of such a suit as this. It would be unjust and unwise to permit a child to discharge the duties of that relation to an adoptive father for that period of time and then permit brothers and sisters of the adoptive father to come in and take from the child all his rights as heir. If parties desire to contest the mental capacity of a kinsman to

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adopt a child, they must proceed with diligence, and not delay until witnesses have died, have moved away, or have forgotten the matter. It would open the way to the most flagrant abuses to permit a judgment fixing the status of a child to be vacated after such a long lapse of time, and it would also encourage, what equity abhors, sloth and negligence. There was no error in sustaining the demurrer to the complaint.

Judgment affirmed.

Filed April 7, 1885.

101 344
124 440

No. 11,036.

HINTON v. WHITTAKER ET AL.

PARTITION.—*Descents.*—*Husband and Wife.*—*Abandonment.*—To a petition by a surviving husband for partition of lands of which the wife died seized, an answer that before and at her death he had abandoned her without cause, making no provision for her support, is good on demurrer under section 2448, R. S. 1881.

EVIDENCE.—*Practice.*—*Supreme Court.*—*Error Compensatory.*—A party, upon whose objection evidence admissible for either party has been excluded, will not be heard by the Supreme Court to complain of a subsequent exclusion of like evidence offered by him.

From the Howard Circuit Court.

J. C. Blacklidge and *W. E. Blacklidge*, for appellant.

J. W. Kern, *B. F. Harness* and *F. Cooper*, for appellees.

HOWK, J.—This suit was commenced by the appellant Hinton, as sole plaintiff, against the appellees Whittaker and others, as defendants, to obtain the partition of certain real estate in Howard county. In his complaint Hinton alleged that he was the owner in fee simple of an undivided one-third part, and that the appellees in certain specified shares were the owners in fee simple of the undivided two-thirds part of the real estate described, as tenants in common; and he asked judgment that his share of such real estate be set off to him in severalty, and for other proper relief. The cause was put

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at issue and tried by a jury, and a verdict was returned for the appellees, the defendants below, and over the appellant's motion for a new trial the court adjudged that he take nothing by his suit, and that the appellees recover of him their costs.

The first error of which complaint is made in argument by the appellant's counsel is the overruling of the demurrer to the second paragraph of the appellees' answer. In this paragraph of their answer, the appellees alleged that the appellant ought not to recover in this action, because he owned no interest, legal or equitable, in the real estate described in his complaint; that the only fact upon which he based his right to recover was that he was the husband of Mary W. Hinton, who died intestate on the — day of —, 1882, seized in fee simple of such real estate, leaving the appellees, her children and grandchildren, surviving her; that the appellees were descendants of Mary W. Hinton in virtue of her first marriage; that on the 19th day of December, 1872, the appellant and Mary W. Hinton were married, and lived together as husband and wife until the 15th day of October, 1881, when the appellant, then the husband of Mary W. Hinton as aforesaid, without any just cause whatever, abandoned her, his wife, leaving her in a feeble, destitute and helpless condition, and remained away from her until her death as aforesaid, and that he did not make, nor cause to be made, suitable provision, or any provision for her, his wife, before the time he abandoned her as aforesaid, and did not at any time, or in any manner, make for her or afford to her any provision for her maintenance, care or support after the 15th day of October, 1881, when he so abandoned her. Wherefore the appellees said that the appellant owned no part of the real estate aforesaid, and they prayed judgment for their costs, etc.

It is manifest from the facts stated therein, that this paragraph of answer was framed and prepared to present the case provided for in section 2498, R. S. 1881, in force since May 6th, 1853. This section reads as follows: "If a husband

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shall abandon his wife without just cause, failing to make suitable provision for her, or for his children, if any, by her, he shall take no part of her estate."

The second paragraph of answer, the substance of which we have given, states clearly and explicitly the appellant's abandonment of his wife without just cause, and his failure to make suitable provision for her. This was sufficient to show that, under our statute of descents, the appellant as husband could take no part of his deceased wife's estate. *Dye v. Davis*, 65 Ind. 474. The paragraph of answer closely follows the language of the section of the statute above quoted, and states the precise case wherein the statute declares that the husband "shall take no part" of his deceased wife's estate. The court did not err, we think, in overruling the appellant's demurrer to the second paragraph of appellees' answer.

The only other error assigned by the appellant is the overruling of his motion for a new trial. Among the causes assigned by the appellant for such new trial were the following:

3. Error of the court in excluding from the jury the evidence of a witness named, offered by the appellant, to this effect: "That the deceased Mary Hinton, the party through whom the parties to this suit all claim title, admitted to witness, after the plaintiff had gone away, and after the time it is alleged by the defendants that he had abandoned her, that plaintiff was coming back in the following spring in time to make garden, when they were going to keeping house again."

4. Error of the court in excluding from the jury the evidence of two named witnesses, offered by appellant, which evidence consisted of a conversation the witnesses had with the decedent, Mary Hinton, the party through whom all the parties to this suit claimed title to the real estate in dispute, on the — day of September, 1881, consisting of the declarations of such decedent to the effect "that her husband, the plaintiff, was unable to support them both, and that they had agreed to quit house-keeping during the winter following, and

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he, the plaintiff, was going to his children in Rush county, Indiana, and that she was going to hers until the spring following;" this statement having been made by such decedent while she was owning and in possession of the lands in dispute.

5. Error of the court in excluding from the jury the evidence of another named witness, offered by appellant, which evidence was to the effect that the decedent, Mary Hinton, in a conversation had about a year before her death, admitted to witness and stated "that plaintiff was unable to keep them both, and that he was going to stay with his children in Rush county, and she with her children, throughout the winter of 1881-2."

The appellees' counsel earnestly insist that the appellant is in no condition to complain here of these alleged erroneous rulings of the trial court, in the exclusion of offered evidence. Counsel say: "If the declarations of Mary W. Hinton were admissible at all to prove the circumstances of the separation between her and plaintiff, it was competent for either party to the action to prove them—both parties claiming title through her." Counsel then cite from the record a number of instances in which the trial court had, upon the appellant's objections, and before making the rulings of which he complains as erroneous, excluded from the jury the declarations of Mary W. Hinton of and concerning the appellant's abandonment of her without just cause, and his failure to make suitable provision for her, when such declarations were offered in evidence by the appellees. The point thus made by appellees' counsel seems to us to be well taken and supported by authority. *Gaff v. Greer*, 88 Ind. 122; S. C., 45 Am. R. 449; *Lowe v. Ryan*, 94 Ind. 450.

Without deciding, therefore, whether the declarations of Mary W. Hinton, offered by appellant and excluded by the court, were or were not competent evidence, we are of opinion that the appellant, having first obtained rulings of the trial court excluding from the jury declarations of the decedent on the same subject when offered by appellees, can not be heard

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to complain of the action of the court, as erroneous, in excluding from the jury the declarations offered by himself.

Appellant's counsel also claim that the verdict of the jury was not sustained by sufficient evidence, and that for this cause a new trial ought to have been granted. There was conflict in the evidence, it is true, upon the matters in issue between the parties; but it can not be denied, we think, that there is evidence in the record which tends to sustain the verdict on every material point. In such a case, as has often been decided, this court will not disturb the verdict on what might seem to be the weight of the evidence.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed April 7, 1885.

No. 12,020.

THE INDIANAPOLIS, DELPHI AND CHICAGO RAILROAD
COMPANY v. HOLMES.

RAILROADS.—*Contract.*—*Condition Precedent.*—To assist the plaintiff, a railroad company, in building its road as proposed, H. agreed in writing to pay it \$200 upon the arrival at Delphi from Indianapolis of the first train of cars over the track of railroad proposed to be built by the plaintiff from Indianapolis to Chicago. The road was built from Delphi to within one and a half miles of Indianapolis, but by a different route, and thence to a depot in the latter place the track of another road was used, and by this line a train of cars came from Indianapolis to Delphi.

Held, that the condition precedent was not performed, and there could be no recovery.

From the Carroll Circuit Court.

J. C. Odell and *T. H. Palmer*, for appellant.

J. A. Sims and *C. E. Taber*, for appellee.

MITCHELL, J.—There was a special finding of facts by the court in this case, and as the only error assigned which involves the merits of the controversy is, that the court erred

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in its conclusions of law upon the facts found, the case may be disposed of by a consideration of the facts deemed to be material as found by the court, and a determination of the law upon such facts.

The suit was upon a written instrument, signed by William W. Holmes, bearing date November 3d, 1871, the purport of which was that on the arrival of the first train of cars at Delphi, Indiana, from Indianapolis, over the track of railroad proposed to be built from Indianapolis, Indiana, to Chicago, Illinois, and to aid in such building, and in consideration thereof, Holmes promised to pay the railroad company, above named, \$200, with ten per cent. interest if not paid at maturity.

The court found that the railroad company was organized pursuant to the laws of this State, in May, 1869, and received from the defendant at its date, the obligation above mentioned; that after procuring the right of way and constructing its road from Delphi to Rensselaer, a distance of about thirty miles, and expending about \$75,000 in addition in procuring right of way between Rensselaer and Dyer, the railroad company executed a trust deed to one Morris Sharp to secure a contemplated issue of \$900,000 of its bonds. This deed and a supplemental deed or mortgage executed to the same person for the same purpose as the first, embraced all the property, real and personal, of the company, including its franchises, excepting only two subsidies mentioned in the last deed, one voted by Union township, in White county, and one by Deer Creek township, in Carroll county. On the 18th day of December, 1880, pursuant to a decree of foreclosure had under the deeds above mentioned, all the property embraced therein was sold by a special master to a trustee of the Chicago and Indianapolis Air-Line Railway Company, which sale was duly approved by the court, and the property transferred to the last named company. This company then took possession of the property and completed the road from Dyer to Rensselaer, connecting there with that

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built by the plaintiff company from Delphi to Rensselaer. Subsequently it completed the road from Delphi to Howland station, in Marion county, which is a station on the Wabash, St. Louis and Pacific Railroad, about one and a half miles from the corporate limits of the city of Indianapolis, and by an arrangement with the Wabash road, under which its track was used from thence to the Union Depot, a distance of four and a half miles, the Air-Line company ran a train of cars from Indianapolis to Delphi on the 26th day of March, 1883, and continued to run them regularly from that time forward, using the track of the Wabash road from Howland station to the Union Depot.

It is found that the Indianapolis, Delphi and Chicago Railroad Company had made a survey of a line, before its property and franchises were sold, from Delphi to Indianapolis, the expense of which was paid by donations, but the Air-Line Company, which acquired its property, rights and franchises, adopted another independent route which it surveyed for itself, nothing more having been done by the first company between these points than to survey a line. It was also found that the instrument sued on never was in the actual possession of the Air-Line Company, but at all times remained in the hands of the plaintiff or its agents.

Upon the foregoing facts the court stated its conclusions of law to the effect that the plaintiff was not entitled to recover, to which, without any motion for a new trial, exceptions were taken by the appellant.

The consideration upon which the contract sued on was made, was the implied promise of the Indianapolis, Delphi and Chicago Railroad Company to construct a railway from Delphi to Indianapolis, upon a route then projected. To aid in that enterprise the appellee bound himself to pay the sum of \$200, upon the arrival of the first train of cars at Delphi from Indianapolis, over the track of the railroad proposed to be built from Indianapolis, Indiana, to Chicago, Illinois.

To entitle the plaintiff to recover, it must have been found

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by the court that the conditions upon which the money, according to the contract, became payable, had been performed, that is, that a railroad had been built, or caused to be built by the plaintiff substantially on the projected route, and that a train of cars had arrived at Delphi over it from Indianapolis.

While the contract does not, in terms define any particular line over which the road was to be built between the termini named, it is nevertheless clearly implied that a particular route had been projected or proposed, and the appellee was to pay his money when the road was built from the one terminal point on the line proposed to the other, and the first train of cars had arrived at Delphi from Indianapolis over that line, and no other. He had a right to contract that way, and as a condition precedent to the plaintiff's right to recover the money from him, it must show a substantial compliance on its part. This it has failed to do. It is not found that the road was built, or that a train of cars arrived at Delphi, over the line proposed. On the contrary, it is expressly found by the court that after the sale to the Air-Line Company, a new and independent route was surveyed, and that the road was located and built on that line. To what extent this new line varied from that originally proposed does not appear in the findings of the court. It may have been inconsiderable, or it may have been widely different, but as it was necessary for the plaintiff to show a substantial compliance, its failure to show that it was built on the line proposed, or substantially so, was fatal to its right of recovery.

Moreover, the arrival of the train of cars which was to designate the time of payment, was a train over the track proposed from Indianapolis. By no intendment can this be taken to mean a train which should pass over the track of the Wabash, St. Louis and Pacific Railway Company from Indianapolis to Howland station, four and a half miles from the depot in Indianapolis, thence to Delphi over its own track. It may well be supposed that it was an inducement in the appellee's mind to extend aid to the plaintiff company in order

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to secure an independent competitor of the very company to which it, or its successor, became in a measure subservient. To build the road to a point within a mile and a half of the city limits, and without any terminal facilities of its own, to proceed thence, under some arrangement, temporary so far as appears, over the track of another company to the depot, is not a substantial compliance with the contract, even if the road had been built in other respects as proposed. This was ruled in *People, ex rel., v. Town of Clayton*, 88 Ill. 45. See, also, *Freeman v. Matlock*, 67 Ind. 99.

It was held in *Stockton, etc., R. R. Co. v. City of Stockton*, 51 Cal. 328, that where a railroad company would become entitled to a subsidy on condition that it should construct a railroad on a certain proposed route, the purchase and adoption of another piece of road which was already built on part of the proposed route did not forfeit its right to the subsidy. But that is widely different from merely making a temporary arrangement under which the track of another company is used in conjunction with it.

Whatever else may have been uncertain as to the projected route, two points were definitely fixed, and the money was only to be paid when the first train of cars arrived at Delphi from Indianapolis over the track proposed. As it is not found that these conditions have been complied with, no recovery can be had. *Shearer v. Evansville, etc., R. R. Co.*, 12 Ind. 452; *Parker v. Thomas*, 19 Ind. 213; *Taylor v. Fletcher*, 15 Ind. 80. As the plaintiff can not recover for the reasons already indicated, little need be said concerning the other points raised.

It may be remarked, however, that from the facts found it would seem that whatever right the plaintiff had in the contract sued on was transferred, under the sale, to the Air-Line Company, and whether it was transferred or not we should doubt the right of the plaintiff to recover on it, by showing that some other company had built a road, even if built in substantial compliance with the contract, unless it was made

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to appear that the plaintiff company had in some substantial way caused or promoted the building of it.

The judgment is affirmed, with costs.

Filed April 11, 1885.

No. 11,807.

MARKS v. THE STATE, EX REL. VANDERKOLK.

PRACTICE.—*Deposition.*—*Continuance.*—*Diligence.*—Where a witness resides in another State, it is the duty of a party to take his deposition, and if he fails to do this he can not secure a continuance upon the ground that the witness promised to be in attendance at the trial, but violated his promise.

SAME.—*Harmless Error.*—Where a party applies for a continuance upon the ground that a witness is absent, but it appears that on the trial the witness was present and testified, the error in refusing the continuance is a harmless one.

SAME.—*New Trial.*—*Newly Discovered Evidence.*—One who seeks a new trial on the ground of newly discovered evidence must rebut all presumptions against him, and where a witness is subpoenaed but fails to attend, it is the duty of the party to show that he took steps to secure his attendance by compulsory process.

BASTARDY.—*Evidence.*—It is proper to permit the relatrix, in a prosecution under the statute regulating proceedings in bastardy cases, to prove that the defendant was frequently in her company.

From the Tippecanoe Circuit Court.

R. C. Gregory, W. B. Gregory, G. O. Behm, A. O. Behm and R. P. DeHart, for appellant.

W. C. Wilson, J. H. Adams, H. W. Chase, F. S. Chase and F. W. Chase, for appellee.

ELLIOTT, J.—The appellant prosecutes this appeal from a judgment rendered against him in a proceeding under the statute regulating proceedings in bastardy cases.

He asked and was denied a continuance. One of the witnesses named in the affidavit was a resident of the State of Illinois, and it was the duty of the appellant to have taken

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her deposition. It was carelessness on his part to rely on her promise to be in attendance at the trial. Where a party desires the testimony of a witness not within the jurisdiction of the court, he must take the deposition of the witness, for he can not have compulsory process to compel attendance, and he has no right to have a continuance upon the ground that the witness has promised to attend, and will attend at a future term.

Another one of the witnesses named was present and testified on the trial. As the appellant had the full benefit of the testimony of this witness no harm was done him by the refusal of the court to grant a continuance.

The third witness named in appellant's affidavit was not subpoenaed as a witness, and no diligence appears to have been used to secure her attendance. Nor does it sufficiently appear that her testimony was material; nor is there any sufficient excuse shown for her absence. It is not shown with certainty that she was too ill to attend court, for all that is stated upon this subject is composed of the mere conclusions of the affiant.

There was no error in permitting the relatrix to prove that the appellant was frequently in her company, and that they were out in a buggy together. It was not material whether this testimony did or did not contradict the statements of the appellant, for it was admissible for the purpose of showing the familiarity that existed between him and the relatrix. It is always proper in such cases as this to show the previous acquaintance, conduct and relation of the parties. It is, as the decisions declare, more probable that sexual intercourse will take place between persons whose relations have been of intimacy, than between those whose acquaintance is slight, and who have not been much together. *State v. Markins*, 95 Ind. 464; S. C., 48 Am. R. 733.

We can not disturb the verdict upon the evidence, for it is supported upon every material point.

The affidavit made in support of a new trial, upon the

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ground of newly discovered evidence, shows that Nelson, the witness whose testimony was alleged to have been newly discovered, was subpoenaed as a witness, but it does not appear that any inquiries were made of him until after the trial. It is true that the affidavit states that he did not attend the trial, but this did not dispense with the duty of the appellant to ascertain what he would testify to, and to secure his attendance by compulsory process. The fact that he was subpoenaed as a witness indicates that the appellant had reason to believe that he had knowledge of material facts, and it was, therefore, appellant's duty to have secured his attendance and examined him. In cases such as this the applicant for a new trial must make a strong case and rebut all legal presumptions which arise against him, and this the affidavit in this case is very far from doing. *Hines v. Driver*, 100 Ind. 315.

Judgment affirmed.

Filed Feb. 19, 1885; petition for a rehearing overruled April 23, 1885.

No. 12,028.

**MCKINNEY ET AL. v. THE STATE, FOR THE USE OF NIXON,
DRAINAGE COMMISSIONER.**

101	355
1171	91

DRAINAGE.—Assessment.—Commissioner.—Complaint.—‘Relator’—Where suit is brought under section 4, Acts 1883, p. 178, to enforce a ditch assessment, it is not necessary for the complaint to allege that the commissioner had determined to bring suit. And if the complaint shows beyond question that the suit is in the name of the State, for the use of the commissioner, to enforce a ditch assessment, the mere fact that the commissioner has styled himself “relator” therein does not change the character of the action, or impair the legal effect of material averments.

SAME.—Delivery of Copies of Petition and Order of Reference.—Presumption.—The delivery by the clerk of copies of the petition and order of reference to the commissioners of drainage is not jurisdictional, and the statute conclusively presumes it to have been done, after the assessments have been confirmed and the work established; and the fact can not be disputed by an answer.

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SAME.—Effect of Default.—Under section 383, R. S. 1881, a default does not admit the amount claimed to be due; it merely admits the material and traversable averments of the complaint, and that something is due the plaintiff, leaving the amount to be established by proof, and this applies to defaults in suits for enforcing ditch assessments.

PRACTICE.—Demurrer.—Failure to Plead Over.—If a party fails to plead over after a demurrer is overruled, judgment should be entered as upon default, and the interposition of a defective answer, to which a demurrer was sustained, is a failure to plead over, and the case should thereafter proceed as though no answer had been interposed.

From the Clinton Circuit Court.

J. N. Sims, for appellants.

S. H. Doyal and *P. W. Gard*, for appellee.

BEST, C.—This action was brought by the appellee, under section 4, Acts of 1883, p. 178, to enforce a ditch assessment. A demurrer to the complaint was overruled, and a demurrer to the answer was sustained. The appellants declining to further plead, the damages were assessed at \$310, after which a motion for a new trial, on the ground that the damages assessed were excessive, was overruled and judgment rendered accordingly. These rulings are assigned as error.

The section of the statute under which this suit was instituted provides that the commissioner of drainage "may, if he so determine, bring suit in the name of the State of Indiana, for his use, * * * to enforce a lien upon any tract or tracts of land for the amount so assessed by him," and it is insisted that as the complaint does not aver that the commissioner had determined to bring the suit, the complaint was insufficient. There is nothing in this objection. The statute simply provides the remedy and authorizes, but does not require, the commissioner to pursue it. No averment of his determination is required.

The cause was entitled, "The State of Indiana, *ex rel.* Francis M. Nixon, commissioner of drainage for Clinton county," and in the body of the complaint the commissioner also styled himself "relator," and for this reason it is insisted that the complaint was insufficient. We think other-

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wise. The complaint shows, beyond question, that the suit was in the name of the State, for the use of the commissioner of drainage, to enforce a ditch assessment, and the mere fact that the commissioner in portions of the complaint denominated himself "relator" in no manner changed the character of the action or impaired the force or legal effect of the material averments of the complaint.

The complaint does not aver that a copy of the petition and order of reference was delivered by the clerk to the commissioners of drainage, and for this reason it is insisted that the complaint was insufficient. This was unnecessary. This direction precedes the confirmation of the assessments and the establishment of the work, and by the 8th section of the act of April 8th, 1881, it is provided that "such judgment shall be conclusive that all prior proceedings were regular and according to law." This statute supplies the averment. The delivery of this copy is not jurisdictional, but is an act directed to be done after jurisdiction has been acquired, and, therefore, the statute conclusively presumes it to have been done. *Scott v. Brackett*, 89 Ind. 413.

Some other objections were made to the complaint upon the ground that certain formalities in the original ditch proceedings are not alleged to have been observed, but none of them are well taken for the reason last above given.

The answer merely alleged that the clerk did not deliver a copy of the petition and order of reference to the commissioner of drainage. This fact could not be controverted for the reasons already given, and the answer should have been stricken out on motion. The demurrer accomplished the same purpose, and was, therefore, properly sustained.

The only evidence offered in the assessment of damages was proof that the attorney's fees were worth \$40. No evidence was offered as to the amount of the ditch assessments, and for the want of it the appellants insist that the damages assessed were excessive.

Our statute provides that "Every material allegation of

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the complaint not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purpose of the action, be taken as true; but allegations of new matter in a reply are to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require. Allegations of value or amount of damages shall not be considered as true by the failure to controvert them." R. S. 1881, section 383. Under this section of the statute, it has been repeatedly held that a default admits all the material and traversable averments of the complaint, and that something is due the plaintiff, but the amount is to be established by proof. *Briggs v. Sneghan*, 45 Ind. 14; *Goble v. Dillon*, 86 Ind. 327; S. C., 44 Am. R. 308.

Our statute also provides that "the judgment upon overruling a demurrer, shall be that the party plead over," and that "If a party fail to plead after the demurrer is overruled, judgment shall be rendered against him as upon a default." R. S. 1881, section 345. This case is within this statute. After the demurrer was overruled to the complaint, and the appellants failed to plead over, the appellee was entitled to a judgment as upon a default. The interposition of a defective answer to which a demurrer was sustained was a failure to plead over, within the meaning of the statute, and the case was thereafter to proceed as though no answer had been interposed. Allegations of value and of amount of damages not being admitted by a failure to deny them, and the appellee being entitled to judgment as "upon a default," he was required to establish the amount of them by proof, the same as upon default. *Hodson v. Davis*, 43 Ind. 258; *Pullman P. C. Co. v. Taylor*, 65 Ind. 153; S. C., 32 Am. R. 57.

The appellee's suggestion that the admission made by filing the demurrer is equivalent to proof of the amount of damages alleged is untenable. Such admission is made by the demurrer and is alone considered in determining the questions raised by it. After the demurrer is overruled, the ad-

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mission no longer remains and can not be regarded for any purpose. Thereafter the cause proceeds as though the demurrer had not been interposed.

In the absence of proof as to the amount of the assessments, the appellee was not entitled to recover the amount awarded him, and for the error in overruling the motion for a new trial, on the ground that the damages assessed were excessive, the judgment should be reversed.

PER CURIAM.—It is therefore ordered, that the judgment be and it is hereby reversed, at the appellee's costs, with instructions to set aside the assessment of damages and to reassess the same.

Filed April 23, 1885.

No. 11,380.

POTTS v. HARTMAN.

101	359
149	381

PLEADING.—*Purpose of.*—The object of pleading is to bring the parties to an issue on the precise matters in dispute, by a presentation of the grounds of claim on the one side, and of defence on the other.

SAME.—*Complaint.*—*Modified Contract.*—Where suit is brought on a contract which has been modified, the complaint must be based on the contract as modified, and if defective in this respect, it can not be cured by the averments of a reply to an answer.

SAME.—*Contract in Parts.*—*Exhibits.*—Where an action is on a contract in writing, consisting of separate parts, all the parts or copies of all must be filed with the complaint.

SAME.—*Harmless Error.*—Where a complaint is essentially defective, the plaintiff can not be heard to complain that a demurrer to an answer to it has been erroneously overruled, for he is not substantially injured by such an error.

From the Marion Superior Court.

J. L. Griffiths, A. F. Potts, W. W. Herod and F. Winter,
for appellant.

F. Rand and J. M. Winters, for appellee.

NIBLACK, J.—On the 29th day of July, 1875, Mrs. Mary A. Potts entered into a written contract with Jacob H. Mc-

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Clure and George H. McClure for the erection for her of a double frame dwelling-house in the city of Indianapolis, at a cost of \$3,800, to be completed according to certain specifications, and delivered to her on or before the 9th day of October in the same year. Eight hundred dollars were to be paid when the joists of the first story were up; one thousand dollars when the joists of the second story were up; one thousand dollars more when the roof should be put on; five hundred dollars when the plastering was finished, and the rest when the building might be completed. The contract contained many minute and distinct provisions, one of which was that the work was to be done under the supervision of an architect. Another was that should Mrs. Potts, at any time, as the work on the building progressed, request any alterations, deviations or omissions from, or additions to, the contract, she should be at liberty to have the same made, and such alterations, deviations, omissions or additions were in no way to affect, or make void, the contract between the parties, but the amount of any such changes was to be added to or deducted from the contract price, as the case might be, according to a fair and reasonable valuation to be made by the architect.

On the day of, and concurrently with, the making of this contract, the McClures executed to Mrs. Potts a bond, in the penal sum of \$3,800, with Matthew Hartman as their surety, conditioned that they would construct and complete the proposed dwelling-house within the time, and in the manner specified, and deliver the same to her, free from any and all liens in favor of laborers or material men. Mrs. Potts afterwards requested that certain additions should be made to the building, upon which valuations were placed by the architect.

The building not having been completed within the time prescribed, disagreements between the parties having intervened, and difficulties having occurred concerning payments for labor performed upon, and materials furnished for, the building, Mrs. Potts and the McClures, on the 29th day of

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October, 1875, entered into an additional, or supplemental, contract in writing, as follows:

"Articles of agreement made and entered into (this) 29th day of October, 1875, by and between Mrs. M. A. Potts, of the city of Indianapolis, of the first part, and J. H. McClure and G. H. McClure, of said city, parties of the second part. Witnesseth, That the said party of the first part do hereby covenant, promise and agree to pay, or cause to be paid, the workmen doing work on new frame dwelling belonging to the party of the first part, said workmen being employed by said parties of the second part, every Saturday, upon the presentation of a bill by the parties of the second part to the party of the first part, stating that the said workmen have been doing work either at the said house or have been doing work for the said house at the work-shops of the said parties of the second part, and approved by Ralph Merriman, architect and superintendent of said house. And it is further agreed that the said party of the first part shall pay, or cause to be paid, any and all bills of the different parties, employed by said parties of the second part, to do necessary work for completion of said house, approved both by parties of (the) second part and Ralph Merriman, architect, stating that the work mentioned in said bills has been duly performed by the parties presenting them, and that said bills have not already been paid for. * * * * The said above sums are to be deducted from the price of the building yet due and unpaid."

Mrs. Potts, in 1877, commenced this action against the McClures and Hartman, upon the bond executed by them to her, alleging the failure of the McClures, in several specified respects, to complete the building according to the terms of their original contract, and their allowance of divers liens to accrue against the building in favor of workmen and material men, which she had been compelled to pay. Hartman, severing in his defence, answered separately in eight paragraphs.

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The eighth paragraph set up the execution of the additional, or supplemental, contract entered into by the plaintiff and the McClures on the 29th day of October, 1875, herein above set out; averred that Hartman was only surety for the McClures, which the plaintiff well knew; that the additional, or supplemental, contract had relation to the same house which the original contract provided for the erection of; that he, Hartman, did not sign said additional, or supplemental, contract, or in any way join in the execution thereof, nor did he at any time consent in writing to the same, or that it might be made, or that he would be bound thereby.

A demurrer to this paragraph of answer being first overruled, the plaintiff replied that just before the execution of the additional, or supplemental, contract referred to, the plaintiff ascertained that the McClures had not paid certain large debts contracted by them for work done upon, and materials furnished for, her house which they were then engaged in building, for which debts liens were liable to accrue against the house; that the plaintiff thereupon declined to make any further payments to the McClures on account of their contract for the erection of the house; that in consequence the McClures were unable to proceed further with their contract, or to pay the workmen employed by them to work on the house, whereby Hartman was likely to become liable to the plaintiff for heavy damages; that in this condition of affairs Hartman represented to the plaintiff that if she would enter into the additional, or supplemental, contract in question, it would enable the McClures to go on and complete the building without loss to her or to him, and specially requested her, the plaintiff, to enter into such new contract with the McClures; that the plaintiff did thereupon, at the said special request of Hartman and with his knowledge and consent, enter into said new contract with the McClures, which she would not otherwise have done.

A demurrer was sustained at special term to this paragraph of reply, and the plaintiff declining to reply further, final

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judgment upon demurrer was rendered against her in favor of Hartman, and this judgment was afterwards affirmed at general term.

It is claimed here that the court below erred: *First*. In overruling the demurrer to the eighth paragraph of Hartman's answer. *Secondly*. In sustaining the demurrer to the reply to that paragraph of answer.

Other questions were reserved below, but none other have been discussed in argument in this court.

As preliminary, however, to what seems to have been considered by the parties in the court below, as well as in argument here, as the principal question in the cause, it is insisted by counsel for Hartman that Mrs. Potts was not injured by the ruling upon the paragraph of answer referred to, and hence is not now in a position to complain of that ruling.

The object of pleading is to require the grounds of claim to be presented on the one side and of defence on the other, and in this way to bring the parties to an issue upon the precise matters in dispute between them. In a suit upon a contract which has been modified, the complaint must be based upon the contract as modified. A complaint defective in that respect can not be cured by the averments of a reply to an answer to such complaint. *Moak's Van Santvoord's Pl.* 180; *Brown v. Colie*, 1 E. D. Smith, 265; *Chesbrough v. New York, etc., R. R. Co.*, 26 Barb. 9; 2 Chitty Cont. (11th ed.), 1169; *Titlow v. Hubbard*, 63 Ind. 6.

Where the action is upon a contract in writing, the contract, or a copy, must be filed with the complaint. R. S. 1881, section 362; Works Pr., section 415, and authorities cited; *Hight v. Taylor*, 97 Ind. 392.

Where the contract is in separate parts, all the parts, or copies of all, must be filed with the complaint. *Titlow v. Hubbard*, *supra*; *McFadden v. State, ex rel.*, 82 Ind. 558.

The plaintiff, by her demurrer to the eighth paragraph of Hartman's answer, admitted that the additional, or supplemental, contract, set out in that paragraph, had been entered

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into between her and the McClures. The necessary inference from that admission was that the complaint had not declared upon the entire contract existing between her and the McClures, and was, for that reason, essentially defective. When the complaint is thus essentially defective, it is well settled that the plaintiff can not be heard to complain that a demurrer to an answer to it has been erroneously overruled. In such a case the plaintiff can not be regarded as having, in any event, been substantially injured by the ruling upon the answer.

The conclusion we have thus reached as to the effect of the plaintiff's demurrer to the paragraph of Hartman's answer in question dispenses with the present necessity of considering whether, and if so to what extent, the substantial rights of Hartman were affected by the execution of the additional, or supplemental, contract herein above set out. We regard that question as not being now properly before us.

The judgment is affirmed, with costs.

ELLIOTT, J., did not participate in the decision of this cause.

Filed April 24, 1885.

101	364
188	392

No. 11,757.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. QUADE.

RAILROAD.—*Animals Killed.*—*Jurisdiction of Justice of Peace.*—Where animals are killed by a railroad locomotive at different times, the causes of action are separate and distinct, and if one cause of action is for an amount under fifty dollars, it must be brought before a justice of the peace.

From the Jasper Circuit Court.

W. F. Stillwell, for appellant.

J. H. Wallace and *J. C. Wright*, for appellee.

ELLIOTT, J.—The first paragraph of the appellee's com-

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plaint seeks to recover the value of a mare and colt killed by the locomotive of the appellant, at a place where the track was not fenced, on the 7th day of May, 1882, and the second paragraph seeks to recover the value of a cow killed at the same place, on the 5th day of June, 1882. The value of the property described in the first paragraph of the complaint is alleged to be \$225, and the value of that described in the second paragraph is alleged to be \$40.

The appellant demurred to the second paragraph upon the ground that the court did not have jurisdiction of the subject-matter of the action.

Counsel contend that as the value of the cow killed is shown to be less than \$50 the action should have been brought before a justice of the peace, and that the circuit court had no jurisdiction of the cause of action stated in the second paragraph of the complaint. This contention must prevail. The statute invests justices of the peace with exclusive original jurisdiction in cases where the value of the animal killed does not exceed \$50. *Louisville, etc., R. W. Co. v. Johnson*, 67 Ind. 546. Animals killed at the same time may be sued for in a single paragraph, if there is only one cause of action in such cases, but where the animals are killed at different times, the causes of action are separate and distinct. The cause of action stated in the first paragraph was one over which the circuit court had jurisdiction, but that stated in the second paragraph was one solely within the jurisdiction of justices of the peace. The cases of *Indianapolis, etc., R. R. Co. v. Elliott*, 20 Ind. 430, *Indianapolis, etc., R. R. Co. v. Kercheval*, 24 Ind. 139, *Toledo, etc., R. W. Co. v. Tilton*, 27 Ind. 71, and *Jeffersonville, etc., R. R. Co. v. Brevoort*, 30 Ind. 324, are directly in point and decisively in favor of the appellant's position.

Judgment reversed.

Filed April 2, 1885.

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No. 11,808.

**PECK v. THE LOUISVILLE, NEW ALBANY AND CHICAGO
RAILWAY COMPANY.**

REAL ESTATE, ACTION TO RECOVER.—*Title.*—A plaintiff in ejectment must trace his title to the United States, or to some grantor in possession at the date of his conveyance.

SAME.—*Substituted School Lands.*—*Selection.*—Where land originally granted to a State for school purposes became unavailable, and other lands were substituted, it must be shown that such substituted lands were actually selected by the secretary of the treasury, as required by the statutes of the United States; without such selection the title did not pass.

SAME.—*Adverse Possession.*—Adverse possession must be continuous, and under claim of right.

BILL OF EXCEPTIONS.—*Testimony.*—*Practice.*—In order to make testimony a part of the record, on appeal, the bill of exceptions must state, not merely that such testimony was offered, but that it was given.

RAILROAD.—*Appropriation of Land.*—*Successive Additions.*—The making of an appropriation of land by a railroad company for its right of way does not exhaust the power; but new appropriations may be made from time to time, as the necessities of the work may require.

From the Tippecanoe Circuit Court.

J. Park, for appellant.

W. F. Stillwell, *J. R. Coffroth* and *T. A. Stuart*, for appellee.

BICKNELL, C. C.—The appellant brought this suit against the appellee to recover the possession of lots Nos. 1, 2 and 3, in the town of Fulton, which are now in the town of Linwood, in Tippecanoe county, Indiana. The complaint was in the statutory form.

The defendant answered by a general denial. There was a finding by the court for the defendant. A motion for a new trial by the plaintiff, alleging that the finding was contrary to the law and to the evidence, was overruled. Judgment was rendered on the finding, and the plaintiff appealed. He assigns as error the overruling of his motion for a new trial. The suit was commenced in May, 1882.

It appeared in evidence that in 1853 the appellee built its

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130	428
101	366
132	428

101	366
170	397

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main track on the land in controversy, and has used the same ever since; that about six years before the commencement of this suit the appellee built a side-track on said land, on the east side of said main track, and about two years before the commencement of this suit built another side-track on said land west of said main track; that in 1856 the appellee erected telegraph poles on the east side of its main track, and has maintained them ever since, and that said eastern side-track is between the main track and the telegraph poles. The appellant makes no claim for the land occupied by said main track. He asserts that some of the land originally granted by the United States to Indiana for school purposes became unavailable, and that other land, of which the lots in controversy are parts, was selected and granted to Indiana for public schools in lieu of such unavailable lands, by virtue of certain statutes of the United States, and that the lots in controversy were sold as school lands to a remote grantor of the appellant. The appellant also claims title by adverse possession.

A plaintiff in ejectment must trace his title to the United States, or to some grantor in possession at the date of his conveyance. *Brandenburg v. Seigfried*, 75 Ind. 568; *Start v. Clegg*, 83 Ind. 78. The land in controversy not being part of the 16th section granted to the State for school purposes, the appellant, in order to show a valid title to it under a conveyance of it as school land by the school commissioner, was bound to show that it had been selected by the secretary of the treasury as required by law.

The second section of the act of congress, 4 U. S. Stat. at Large, page 179, declares "That the aforesaid tracts of land shall be selected by the secretary of the treasury, * * * and when so selected, shall be held by the same tenure, and upon the same terms, for the support of schools, in such township, as section No. 16 is, or may be held, in the state where such township shall be situated." Under such statutes, the title does not pass until the selection is made by the proper officer.

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Atchison, etc., R. R. Co. v. Rockwood, 25 Kan. 292; *Missouri, etc., R. W. Co. v. Noyes*, 25 Kan. 340. So, in *Doe v. Stephenson*, 1 Ind. 115, where a similar question arose under another act of congress, this court said: "The plaintiff was bound to prove that the land he claimed was one of the selections thus confirmed."

The appellant, undertaking to show such a selection, offered in evidence for this purpose a certified copy of a letter from the register of the land-office at Crawfordsville to the commissioner of the general land-office at Washington, in which the register stated: "Pursuant to your instructions" I have reserved from sale certain tracts of land, describing them, for the use of schools, where all or a part of section sixteen had been included in prior reservations. He then offered in evidence a certified copy of list No. 1, Crawfordsville, having the following caption: "List of proposed selections of lands for school purposes under the act of May 20th, 1826, entitled, An act to appropriate land for the use of schools," etc. This list was dated June 4th, 1833, and was signed Samuel Milroy, register. He then offered in evidence a certified copy of a letter from the commissioner of the general land-office to the register at Crawfordsville, dated October 12th, 1839, stating that he encloses a list of tracts reported as school selections under the act of May 20th, 1826, which he says have been approved by the secretary of the treasury, and which he directs the register to enter on his books as appropriated. He then offered in evidence a certificate of the commissioner of the general land-office that the three documents last mentioned were true copies and exemplifications of the originals on file in his office. This certificate is dated October 12th, 1833.

The appellee claims that the foregoing documents, even if in evidence, would not show a selection by the secretary of the treasury.

It is not necessary to consider this question, because the record shows that these documents were not in evidence, but

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were merely "offered in evidence." A statement in a bill of exceptions that certain testimony was offered does not make that testimony a part of the record, and is not equivalent to the statement that such testimony was given. *Baltimore, etc., R. R. Co. v. Barnum*, 79 Ind. 261; *American Ins. Co. v. Gallahan*, 75 Ind. 168; *Douglass v. State*, 72 Ind. 385; *Woollen v. Wishmier*, 70 Ind. 108; *Goodwine v. Crane*, 41 Ind. 335.

In reference to several other matters of documentary evidence essential to the proof of the paper title claimed by the appellant, the statement in the record is, not that they were given in evidence or read in evidence, but that they were offered in evidence. This is true as to the deed alleged to have been executed by the school commissioner, Jesse Evans, and it is true as to the alleged plat of the town of Fulton.

The bill of exceptions states that it contains "all the evidence given or offered in said cause," but this shows only that some evidence was given and some offered, and that the bill of exceptions contains both.

The appellant, therefore, failed to prove his alleged paper title. He also failed to prove title by adverse possession. Such possession must be continuous, and under claim of right. *Doe v. Brown*, 4 Ind. 143.

There was no proof of possession by the grantors of the deeds given in evidence by the appellant. There was proof that on the west side of lot No. 1, between the railroad and the Wabash canal, there was once a saw-mill, which afterwards became a cooper-shop, and was destroyed by fire, but when or by whom it was built, or under what claim of right, was not shown, and it appeared that for twelve or fifteen years next before the commencement of this suit there had been no occupation of the premises except by the appellee. But the finding was right even if the appellant's title were conceded.

The New Albany and Salem Railroad Company, the pred-
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cessor of the appellee, was organized in 1847, under the act of January 28th, 1842 (Acts 1841, p. 3), entitled "An act to provide for the continuance of the construction of all or any part of the public works of this State, by private companies," etc., and under chapter 379 of the local laws of 1846, entitled "An act to change that part of the New Albany and Crawfordsville Macadamized Road, which lies between Salem and New Albany, to a railroad, to be constructed by a private company." Local Laws 1846, p. 424. Section 2 of the last named act confers upon such company all the rights, privileges and immunities granted by the act aforesaid of January 28th, 1842. By section 19 of said act of January 28th, the company was authorized "to enter upon and take possession of any lands and streams of water, which may be necessary for the construction of any such work, and to make the same available." By chapter 349 of the Local Laws of 1848, p. 456, section 3, said company was authorized to extend its work to any other points, and to have and enjoy all the powers and rights conferred upon the State by the internal improvement act of January 27th, 1836, and all the rights granted by the act aforesaid of January 28th, 1842.

A like right of extension was granted to said company by chapter 198 of the Local Laws of 1849, p. 298. Among the powers conferred upon the State by section 16 of the internal improvement act of January 27th, 1836, are the following, to wit: "To enter upon, and take possession of, and use all and singular any lands, streams and materials of any and every description necessary for the prosecution and completion of the improvements contemplated by this act."

Section 17 of the same act provides that no claim for damages shall be allowed unless made within two years after the property has been taken possession of as aforesaid.

Under the foregoing provisions, the New Albany and Salem Railroad Company built its road to Lafayette, and afterwards extended it to Michigan City. Cars were running on the northern division of the road in 1853. Said company held

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its road and franchises until 1872, when, under a foreclosure sale, the appellee, as purchaser, succeeded to all the rights and possession of said company, and has held the same ever since.

The appellant claims that the right of way of the appellee is confined to the ground covered by its main track. But this claim can not be sustained. Making one appropriation under the acts aforesaid of January 27th, 1836, and January 28th, 1842, does not exhaust the power, but new appropriations may be made from time to time, as the necessities of the work may require. *Prather v. Jeffersonville, etc., R. R. Co.*, 52 Ind. 16, 42, and the cases there cited. In the Supreme Court of Illinois, *Chicago, etc., R. R. Co. v. Wilson*, 17 Ill. 123, it was said: "It would be a disastrous rule, indeed, to hold, that a railroad company must, in the first instance, acquire all the grounds it will ever need for its own convenience or the public accommodation."

Section 16 of the internal improvement act above cited, did not fix any limit of width to the land to be appropriated; it authorized the company to take as much as was necessary.

In the case of *Prather v. Jeffersonville, etc., R. R. Co.*, *supra*, the powers of that company under a special charter were similar to those granted by said section 16, *supra*, except that the land to be taken could not exceed sixty feet in width. The company had built its track without fixing any width, and it had a main track and telegraph poles; its situation, except as to the width of its right of way, was almost exactly the same as that of the appellee. This court held that the company was not limited to the ground covered by the track and the telegraph poles, but had a right to such land as was necessary for its road, with all necessary appendages, including place for the erection of telegraph poles at safe distance from the track, and to the use of the intervening space between said track and said telegraph poles. The court said: "It acquired the right of way for the track, and the right to make drains or ditches, fences, side-tracks, turn-tables, water tanks, wood or coal yards, and depots for

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passengers and freight, and to erect telegraph poles, and, so far as this right was exercised, the appropriation for such purposes became complete, and gave it the right to use whatever ground was necessary for such purposes, and the intervening space between the track and the fixture or appendage erected."

The evidence shows that in 1856, the appellee erected telegraph poles on the east side of their main track which they have ever since maintained; these poles were put up, one of them nineteen feet, one eighteen feet, and another fifteen feet eight inches from the center of the main track, and between these telegraph poles and the main track is the eastward side-track. The evidence also shows that the west end of the westward side-track is seventeen feet four inches from the center of the main track, so that the whole width of the land actually appropriated and in use by the appellee is thirty-six feet four inches in addition to what may be necessary for the proper use of said side-tracks.

The same general rules asserted in *Prather v. Jeffersonville, etc., R. R. Co.*, *supra*, were repeated in *Prather v. Western Union Tel. Co.*, 89 Ind. 501. Under these decisions and under the foregoing statutes, the only question is whether the ground thus occupied by the appellee is necessary to make their work available, within the meaning of such statutes. There was evidence upon the trial tending to show that a much larger width of land was absolutely necessary for the proper maintenance and operation of the appellee's railway.

The finding of the court was not contrary either to the law or the evidence, and there was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed April 23, 1885.

Dunnington v. Elston.

No. 11,816.

DUNNINGTON v. ELSTON.

101	373
126	104
101	373
126	323
101	373
153	534

JUDICIAL SALE.—*Protection of Purchaser where Judgment is Reversed.*—*Statute Construed.*—*Ejectment.*—Section 669, R. S. 1881, protects purchasers at judicial sales by virtue of judgments afterwards reversed, but not a purchaser from one who was a successful party to a judgment in ejectment afterwards reversed.

SAME.—*Appeal.*—*Notice.*—*Judgment.*—*Effect of Reversal.*—A party purchasing lands, relying upon a judgment in favor of his vendor in ejectment, must take notice of the right of appeal, and is, therefore, subject to the risk of such appeal and its result.

From the Montgomery Circuit Court.

G. W. Paul, J. E. Humphries, J. M. Thompson, W. B. Herrod and W. H. Thompson, for appellant.

G. D. Hurley, B. Crane, T. H. Ristine and H. H. Ristine, for appellee.

MITCHELL, J.—Elston commenced a suit in ejectment in the Montgomery Circuit Court against Piggott, to recover certain lands which he claimed under a deed made in pursuance of a decree of foreclosure against Piggott and wife.

On the facts found, the circuit court stated its conclusions of law and rendered judgment in favor of Piggott. Shortly after the rendition of this judgment, Dunnington purchased the land, and took a conveyance, from Piggott. Subsequently, and within a year from the rendition of the judgment, Elston appealed the case to this court, where, upon the facts found by the court below, it was ordered that judgment should be rendered for Elston. *Elston v. Piggott*, 94 Ind. 14.

Dunnington then brought this suit in the Montgomery Circuit Court, and averred in his complaint that he purchased and paid for the land in good faith, without any "notice of the facts of said case, or of any appeal, either taken or to be taken from said judgment," and that he was not a party to the record, nor attorney of any party, and that no *lis pendens* notice was filed.

Dunnington v. Elston.

It appears in the complaint that at the time Elston commenced the suit in ejectment, he held the legal title to the land in controversy, and it is not averred that the deed was not duly recorded, or that Dunnington did not have actual notice of it.

He claims that under section 669, R. S. 1881, his title to the land is protected by the judgment in favor of Piggott in all respects as if the judgment had not been reversed in this court. This claim is made because he says he purchased and paid for the land in good faith, relying on the judgment, and without knowing that Elston intended to appeal.

The court below sustained a demurrer to the complaint, and this presents the only question for decision.

Section 669 provides as follows: "The reversal of any judgment by virtue of which any real estate has been sold or transferred, or the title thereto affirmed, shall not avoid the sale, transfer, or title, if the person to be affected thereby shall be, or claim under, a purchaser in good faith, and not a party to the record or attorney of any party."

The contention of counsel is that the appellant is a purchaser in good faith under a title *affirmed* by the judgment of the Montgomery Circuit Court, and that his title must prevail by force of this statute, notwithstanding the reversal of the judgment under which he claims. In this we can not concur.

The title of Elston, under the deed which presumably was of record, can not be defeated by the purchase of Dunnington, now that the judgment under which he claims is wiped out by the appeal.

It was not necessary, in order to preserve his title from a purchaser *pendente lite*, that he should have filed a *lis pendens* notice as provided by section 325, R. S. 1881. His title being of record afforded constructive notice of his rights pending the litigation. Nor is the appellant sustained by section 669.

Where the only title of a purchaser rests upon the judg-

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ment or decree of a court of record, inasmuch as he is bound to take notice of the source of his title, he is charged with notice of all the incidents to which the judgment is subject. He is conclusively presumed to know that the judgment may be appealed from within a limited time, or that by the payment of costs the judgment may be vacated within a time fixed by law.

Dunnington took his title within the time in which by law Elston had the right to appeal, and thereby he took the hazard of the appeal and the reversal of the judgment, and now that the appeal was taken, and the judgment under which he claims is reversed, he can not say he was a purchaser in good faith and invoke the aid of the statute.

A construction of the statute such as the appellant contends for would practically destroy the right of appeal in cases where the title to land is involved, by putting it within the power of the prevailing party below to render an appeal unavailing by a transfer of the title.

It is conceived that the purpose of the statute was to protect persons, other than parties to the record or attorneys of such parties, who in good faith purchased lands at judicial sales, but that it can have no application to a case like this unless the purchaser is in a situation to bring to his aid some element of estoppel against the party who appeals. The case is within the principle of *Smith v. Cottrell*, 94 Ind. 379.

The judgment is affirmed, with costs.

Filed April 8, 1885.

No. 11,883.

CUTHRELL v. CUTHRELL.

EVIDENCE.—*Witness, Competency of.—Party in Action by or against Widow.—*

A party is not a competent witness as to matters which occurred prior to a husband's death, in an action concerning the title to land derived by the widow from her deceased husband.

101	375
185	268
101	375
152	386
101	375
165	561

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SAME.—Practice.—Offer of Competent and Incompetent Evidence.—It is not the duty of the court, where evidence is offered in a body, to sift the competent from the incompetent, but it is the duty of counsel to offer only competent evidence.

SAME.—Deed.—Consideration.—The real consideration of a deed may be shown by parol testimony.

SAME.—Deed.—Delivery.—It is competent to prove by parol the terms and conditions upon which a deed was to be delivered in cases where there is no absolute delivery, and no consideration is paid by the grantee.

SAME.—Quieting Title.—It is proper for a plaintiff, in an action to quiet title, to prove claim of title by the defendant, and to show that the claim is unfounded.

From the Howard Circuit Court.

*J. C. Blacklidge, W. E. Blacklidge, J. W. Kern, B. F. Har-
ness and B. C. H. Moon, for appellant.*

M. Bell, W. C. Purdum and C. Bull, for appellee.

ELLIOTT, J.—It was agreed by the parties, as part of the evidence in the case, that Joseph B. Cuthrell died the owner of a tract of land of which the parcel here in controversy formed a part; that the appellant, the plaintiff below, was the widow of Joseph B. Cuthrell, and that the parcel of land in dispute was set apart to her in a suit for partition in virtue of her rights as the widow of the deceased. The appellant read in evidence a deed for the land, purporting to be executed by her to Joseph F. Cuthrell, and certain questions were propounded to her, and to these questions objections were sustained, and counsel thereupon offered to prove that the consideration of the deed was that Joseph F. Cuthrell was to furnish her a home, provide for her during life, and offered, also, to prove that the deed was not to be delivered until her death, and that it was taken from her drawer without her knowledge and placed upon record. The appellee introduced F. M. Roberts as a witness, and offered to prove substantially the same matters by him.

The court erred in excluding the testimony of the witness Roberts, but did not err in excluding the testimony of the appellant.

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Joseph F. Cuthrell, the appellant's grantee, was dead, and the action was against his widow, and, under the statute, the appellant was not competent to testify as to transactions which occurred prior to her grantee's death. So far as concerns the agreement fixing the consideration of the deed, and so far as concerns the contract as to the delivery of that instrument, there is no room to doubt that the appellant was not a competent witness, and if it were conceded that she was a competent witness to prove that the deed was taken from her drawer without her consent, still, as the offer was made as an entirety, the court was justified in excluding the whole testimony. If a party mingles in one offer competent and incompetent testimony, he is in fault, and must be the sufferer. It would be unjust and unreasonable to impose upon the court the duty of sifting the offered evidence, and separating the good from the bad, the grain from the chaff, and of accepting the one and rejecting the other. It is counsel's duty to offer competent evidence, unmixed with incompetent. It is not the duty of the court to make a separation.

It is an elementary doctrine that the true consideration of a deed may be shown. We are unable to perceive any reason why this rule should not apply here. Possibly the testimony as to the consideration might not have availed the appellant, but that does not prove it incompetent.

Delivery is an essential part of a deed, and an agreement made when a deed is written and signed, as to when and how it shall be delivered, is often competent. We think it was clearly competent in this instance. If the grantee paid no consideration for the land, and there was to be no title vested in him until the death of the grantor, it was surely competent to show the agreement as to the time the delivery should be made.

It is said that the testimony was properly excluded because offered in chief when it was competent only in rebutting. This argument rests on an undue assumption. The appellant sued to quiet title, and it was necessary for her to show

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some claim by her adversary ; this she did by proving the execution and recording of the deed, and, in order to prove another essential element of her case, it was necessary for her to prove that the deed was ineffective. If she had proved the deed and stopped, then she would have failed, because, *prima facie*, title was conveyed by it. If she had not shown an assertion of title by the appellant she would have failed, because it would not have appeared that her title was disturbed or threatened.

The admission that the appellant derived title from her husband did not dispense with evidence that title was asserted by the appellant, and when evidence disclosing the character of the title asserted was given, it became necessary, as part of the case in chief, to show that, although there was an apparent title, there was not, in fact, a real one.

The decisions in *Thompson v. Thompson*, 9 Ind. 323, and *Mather v. Scoles*, 35 Ind. 1, do not meet the question. The contract sought to be proved was not made after the estate had vested, but was made as part of the contract upon which the deed was founded. It was the agreement which fixed the time when the deed should take effect. Of course, if there had been an absolute delivery of the deed, no condition could have been annexed to it by parol, nor could its force have been entirely broken down by mere evidence of failure of consideration. But these questions are not the ones which lie in appellee's way ; the questions here are, did not the appellant have a right to prove the contract as to the consideration and as to the time fixed for the delivery of the deed ? Counsel have no right to assume that there was an absolute delivery of the deed, for the offer was to prove that there was no delivery and that there should be none until after appellant's death.

Judgment reversed.

Filed April 9, 1885.

Myers v. The State.

No. 12,245.

MYERS v. THE STATE.

CRIMINAL LAW.—*Indictment.*—*Surplusage and Repugnancy.*—An indictment which is otherwise sufficient is not bad, under the statute, because of any surplusage or repugnant allegations which do not affect the substantial rights of the defendant upon the merits.

SAME.—*Forgery.*—*When Purport Clause Unnecessary.*—Where an indictment charges the forgery of “a certain order, purporting to have been made and executed by one Vincent T. West,” and following this charge the order is set out in *hæc verba*, and according to its tenor it was signed “Dr. West,” the purport clause will be regarded as surplusage, and disregarded.

SAME.—*Misspelled Word.*—Where an indictment charges the forgery of an order for goods and chattels, and the order, as set out, is for “\$3.00 of *grociars*,” the misspelling does not render the indictment bad.

From the Gibson Circuit Court.

W. R. Skelton, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

ZOLLARS, C. J.—The following portion of the indictment is as much as it is necessary to set out, to present the questions discussed by counsel, viz.: “3d. And the grand jurors afore-said * * * do further present and charge that one George Myers, late of said county, * * * did then and there feloniously, falsely, and fraudulently make, forge and counterfeit a certain order, purporting to have been made and executed by one Vincent T. West, for the payment of property, goods and chattels to him, the said George Myers, which said false, forged and counterfeit order is to the following tenor, to wit:

“‘Mr. Roberts, please let Mr. Myers have \$3.00 of gro-
ciers.

DR. WEST.’

“That the Dr. West, mentioned in said order, was intended to and did mean Vincent T. West; that the Mr. Roberts, mentioned in said order, was intended to and did mean William F. Roberts; that the Mr. Myers, mentioned in said order, was intended to and did mean George Myers, the defendant;

101	379
194	396
101	379
129	154
101	379
133	304
133	584
101	379
135	301
136	359
101	379
141	687
101	379
145	215

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* * * that the said George Myers forged said order as aforesaid, with intent then and there, and thereby, falsely, feloniously, and fraudulently to prejudice, damage and defraud the said Vincent T. West, contrary," etc.

One of appellant's contentions is that the purport of a written instrument is what it appears to be upon its face, and that as the order set out in the indictment, upon such an examination, does not purport to have been made by Vincent T. West, but by Dr. West, the indictment is bad for repugnancy. This contention is supported by the early English cases cited by counsel, but it is not maintainable under our statutes. It is provided in section 1755, R. S. 1881, that the indictment is sufficient if it can be understood therefrom: "*Fifth.* That the offence charged is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case." It is further provided in section 1756, that "No indictment * * * shall be deemed invalid, nor shall the same be set aside or quashed, nor shall the trial, judgment, or other proceeding be stayed, arrested, or in any manner affected, for any of the following defects: * * * *Sixth.* For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged. * * * *Tenth.* For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

If it should be conceded that there is a repugnancy as claimed, it is clearly not available to appellant under these statutes. That is expressly provided against. The purpose of the statutes was and is to free the criminal practice from some of the technical rules of the common law which have outlived their usefulness, and which ought to have passed away with the necessities that brought them into being. Here, the written instrument charged to have been forged is set out in full, with the necessary averments as to who were intended by the names stated in the instrument. There is no defect in the particular contended for, that could, by any

possibility, affect the substantial rights of appellant upon the merits.

The written instrument being set out *in hæc verba*, the purport clause may well be regarded as surplusage, and disregarded, under the statutes above set out. In the case of *Fogg v. State*, 9 Yerger (Tenn.), 391, the court, quoting from BULLER, J., said: "Old cases have given rise to much learning and argument on the words 'purport' and 'tenor,' and the books are full of distinctions as to the meaning of these words, and the necessity of using the one or the other of them in indictments where written instruments are to be stated; but in the many cases upon this subject I can find no judicial determination that the purport and the tenor should both be stated in any case whatever. Purport means the substance of an instrument as it appears on the face of it to every eye that reads it, and tenor means an exact copy of it; and, therefore, where the instrument is stated according to its tenor, the purport of it must necessarily appear."

In the case of *State v. Bibb*, 68 Mo. 286, there was a charge of the forgery of a receipt, "*purporting*" to be the receipt of Charles W. Jeffries. The receipt was set out *in hæc verba*, and upon its face appeared to have been signed by C. W. Jeffries. The court said: "There is no question of variance, as there might have been, if the receipt had not been fully set out in the indictment. The allegation that it purported to be the receipt of Charles W. Jeffries is substantially an allegation that C. W. and Charles W. Jeffries were the same person."

In the case of *State v. Johnson*, 26 Iowa, 407, it was held that the copy of the written instrument need not to be prefaced by any technical words. This decision is instructive in other respects, as it is under statutes similar to ours. Mr. Bishop, in his work on Criminal Procedure, vol. 2, at section 413, says: "In the ordinary form of the indictment, we have seen, the recitation of the tenor of the instrument is preceded by its mention as 'purporting' to be a bond, * * *, or whatever else it appears on its face to be. This is termed the pur-

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port clause. Now, in reason, the purport of recited words is matter, not of fact, but of law, not for the jury, but for the court, and on familiar principles it need not be alleged. Therefore it is believed that the purport clause in the indictment for forgery is never necessary." See, also, *Sharley v. State*, 54 Ind. 168; *State v. Gustin*, 2 Southard (N. J.), 749; *Harding v. State*, 54 Ind. 359.

Regarding, then, the purport clause as unnecessary, and, therefore, surplusage, the order being set out *in hæc verba*, the case is brought within the curative provisions of the statute. As will be observed, the charge in the indictment is that the order is for goods and chattels. The order, as set out, is for "\$3.00 of grociers." It is contended by appellant that this is not the same as an order for groceries, and that hence the order is not for goods and chattels. Here is a misspelling of the word groceries, but that is not sufficient to render the indictment bad, especially under our statutes. 1 Bishop Crim. Proc., section 562; 2 Bishop Crim. Proc., sections 354, 357, 688, and cases there cited.

These are the only questions made in the case, and they are not well made.

The judgment is affirmed, with costs.

Filed April 24, 1885.

No. 11,685.

DEHORITY v. WRIGHT.

DEED.—Covenants Running with the Land.—Encumbrance.—The covenant in a deed against encumbrances runs with the land, and where a remote grantor is compelled to discharge the encumbrance to protect his title, he may sue thereon. *Fisher v. Parry*, 68 Ind. 465, distinguished.

SAME.—Evidence.—Defence.—In a suit upon covenant against encumbrances in a deed, to recover on account of one paid off by the plaintiff, it is no defence that there was still an older one unpaid.

SAME.—Description.—Reformation.—Pleading.—A prayer to reform a deed

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as to description is not necessary to make a complaint for that purpose good on demurrer.

EVIDENCE.—*Record.*—*Reinstatement of.*—A record of a proceeding to reinstate a lost record, which shows an appearance and then a default, and recites that process had been duly issued and served, as appears by the sheriff's return, is good, and is admissible in evidence.

EXECUTION.—*Affidavit.*—*Justice's Judgment.*—*Transcript.*—An affidavit filed with the clerk to obtain execution on the transcript of a justice's judgment need not show non-payment to the clerk.

SAME.—*Evidence.*—*Certificate.*—In such case the fact that the justice made and filed with the clerk a certificate before execution issued may be proved by parol.

From the Madison Circuit Court.

M. A. Chipman, for appellant.

M. S. Robinson and *J. W. Lovett*, for appellee.

FRANKLIN, C.—Appellee sued appellant upon the covenants in a warranty deed in the short form under the statute of Indiana. The breach alleged was encumbrances.

A demurrer was overruled to the complaint; trial by the court; finding for the plaintiff, and, over motion for a new trial, judgment was rendered for the plaintiff.

The errors assigned are, overruling the demurrer to the complaint, and overruling motion for a new trial.

The defendant is a remote grantor of the plaintiff, and the first objection to the complaint is that a remote grantee can not maintain an action against a remote grantor upon the covenant in the deed against encumbrances; that such covenant is a personal one, and does not run with land.

Under the statute of Indiana, a deed containing the words, "conveys and warrants," "shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representatives that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof; that the same are free from all incumbrances, and that he will warrant and defend the title to the same against all lawful claims." R. S. 1881, section

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2927. Each one of these covenants is contained in the general warranty, the same as if they had been separately written in the deed. *Kent v. Cantrall*, 44 Ind. 452.

In the case of *McClure v. McClure*, 65 Ind. 482, where the covenants in a similar deed were sued upon, the court said: "It is thus seen that the deed in question contained, amongst other things, a covenant of general warranty; and this covenant, beyond all doubt, runs with the land."

"Says Chancellor KENT: 'The covenant of warranty, and the covenant for quiet enjoyment, are prospective, and an actual ouster or eviction is necessary to constitute a breach of them. They are, therefore, in the nature of real covenants, and they run with the land conveyed, and descend to heirs, and vest in assignees of the purchaser.' 4 Kent Com. (12th ed.), top p. 471. See, also, *Blair v. Allen*, 55 Ind. 409."

In the case of *Martin v. Baker*, 5 Blackf. 232, it is said: "It appears to us to be a mistake to say, that the covenant of seizin can not pass to the heir or assignee of the grantee. The covenant is not inserted in the deed merely for the grantee's benefit, but for the benefit of all others who may derive their claim to the land through him. Whoever thus derives his right, and ultimately sustains damages in consequence of the covenantor's want of title, may sue him for the breach." In the case of *Coleman v. Lyman*, 42 Ind. 289, the above is quoted with approbation, and the court adds: "This case has stood and been recognized as the law of the State on this point for more than thirty years, and we do not feel that we would be justified in overruling it without stronger reasons than are presented to us in this case. See the case of *Schofield v. Iowa Homestead Co.*, 32 Iowa, 317."

The case of *Burnham v. Lasselle*, 35 Ind. 425, in the above case quoted from, is distinguished, upon the ground that no possession was given in that case.

In the case of *Bethell v. Bethell*, 54 Ind. 428 (23 Am. R. 650), it is said: "But all the cases, so far as we are advised, hold, that where the grantor is not in possession and does not deliver pos-

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session to his grantee, the covenant of seizin, if the grantor had no title, is at once broken and does not run with the land." And in support thereof the following quotation is made from the case of *Chambers v. Smith*, 23 Mo. 174: "If there be a total defect of title, defeasible and indefeasible, and the possession have not gone along with the deed, the covenant is broken as soon as it is entered into, and can not pass to an assignee upon any subsequent transfer of the supposed right of the original grantee. In such case, the breach is final and complete; the covenant is broken immediately, once for all, and the party recovers all the damages that can ever result from it. If, however, the possession pass, although without right,—if an estate in fact, although not in law, be transferred by the deed, and the grantee have the enjoyment of the property according to the terms of the sale, the covenant runs with the land and passes from party to party, until the paramount title results in some damage to the actual possessor, and then the right of action upon the covenant vests in the party upon whom the loss falls."

Where no title is conveyed, and no possession is given or taken under the deed, there is no actual transfer of the land with which the covenants could run. In such case they could be but personal covenants, and a breach would occur immediately upon the execution of the deed. But where title is conveyed by a deed containing our statutory general warranty, and possession passes under the deed, the covenants run with the land, and a remote grantee may maintain an action against a remote grantor for a breach of the covenants.

The case of *Fisher v. Parry*, 68 Ind. 465, is distinguished from the one under consideration, upon the ground that the statute of Minnesota is different from the statute of Indiana upon the subject of covenants in a deed.

In the case under consideration, the deed conveys a good title, subject to the encumbrance then existing on the land, and possession accompanied the deed and continues in the

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plaintiff. In such cases the covenant in the deed against encumbrances runs with the land. *Sage v. Jones*, 47 Ind. 122. The plaintiff, in order to protect his title, was compelled to redeem from the sheriff's sale, and has a right of action for the breach of the covenant.

A further objection to the complaint is, that in the deed the name of the State in which the land is situated is left blank.

The name of the county and a description of the land are stated in the deed; it was executed and recorded in Madison county, Indiana. The complaint alleges that the omission of the name of the State was an inadvertence of the draftsman; that the land sold and intended to be conveyed was situated in the State of Indiana, and was the identical land in controversy, and prayed for general relief.

We think the complaint in this respect is sufficient to withstand a demurrer, without a specific prayer for reformation. *Rhode v. Green*, 26 Ind. 83. But if we were permitted to look to the evidence, it would be seen that the deed, as therein contained in the bill of exceptions, does state the name of Indiana as the State in which the land is situated. There was no error in overruling the demurrer to the complaint.

The first reason urged under the motion for a new trial is an objection to the introduction in evidence of the record of the proceedings for reinstatement of the transcripts of the judgments upon which the sheriff's sale above referred to was had, said record having been destroyed by fire. The objection to the record was that it did not contain a copy of the summons and service thereon.

The record shows an appearance of the parties, a default of the judgment defendants, and that process had been duly issued and served upon the defendants, as was shown by the return of the sheriff thereon.

The appearance of the parties waived all objections to the process, and we think enough is shown to give the court jurisdiction of the case, and that the record was admissible evidence.

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The next reason insisted upon is an objection to the sufficiency of the affidavit for executions upon said judgments. The objection is that the affidavit does not negative payment of the judgments to the clerk. This was not necessary; the law did not authorize the clerk to receive money on transcripts from a justice of the peace. The affidavit averred non-payment to the judgment plaintiffs. That was sufficient. As to the objection that it did not state the amount due, it stated the amount of the judgments, and that they were not paid; that is substantially stating the amount due.

The third reason for a new trial is an objection to a question to the justice of the peace while on the witness stand, to wit, "State what, if anything, you know of issuing and filing a certificate in the clerk's office prior to the issuing of executions on these judgments?"

The justice was not required to keep a record of these facts, and it was competent to prove them by oral testimony. We see no reasonable objection to this question.

The fourth reason for a new trial is based upon an objection to the answer to the foregoing question. The bill of exceptions does not show that any objection was made to this answer, or that any motion was made to strike out. Therefore, this reason presents no question for consideration.

The last reason insisted upon by appellant is, that the evidence does not support the finding of the court. This is based, in part, upon the fact that it shows the plaintiff to be a remote grantee, and therefore not entitled to recover. This question has already been discussed and decided against appellant.

It is further insisted that the evidence shows an older judgment and a prior lien upon the land than the judgments and sale from which the plaintiff redeemed. If the defendant is liable for a prior encumbrance not paid off by the plaintiff, we can not see how that can relieve him from liability for the encumbrance which the plaintiff did pay in order to protect his title.

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One witness testified that there was another transcript of a judgment recorded of a later date than the alleged recording of the transcripts of the judgments upon which the land was sold, and from which sale the plaintiff had redeemed; and that other transcript was the oldest encumbrance upon the land. This testimony was in conflict with other evidence in the case. And the court below having passed upon the weight of the evidence, this court will not disturb its finding thereon. We think the evidence sustained the finding of the court, and there was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Jan. 28, 1885.

ON PETITION FOR A REHEARING.

FRANKLIN, C.—Appellant in his petition for a rehearing insists that the covenant against encumbrances in a warranty deed is a personal covenant, and does not run with the land, and that a remote grantee can not maintain an action against a remote grantor on such a covenant.

In the case at bar, there was a judgment which was a lien upon the land when the defendant sold and conveyed by a warranty deed; it remained the same when defendant's grantee sold and conveyed the land by warranty deed to the plaintiff; possession passed under the several deeds. Execution was issued on the judgment, and the land was sold under it, while in the possession of the plaintiff, who redeemed the land from the sheriff's sale in order to protect his title. The lien of the encumbrance ran with the land so closely as to cause the land to be seized and sold for the payment of the judgment, and we see no good reason in law or equity why the covenant should not run with the land.

In order to establish the defendant's liability, it can not be necessary that the plaintiff should sue his immediate grantor,

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who in turn would have to sue the defendant, thereby heaping up a double bill of costs against the defendant, instead of, in the first place, suing the one ultimately liable.

But it is insisted by appellant that the decision in this case is in conflict with the decision in the case of *Fisher v. Parry*, 68 Ind. 465, and it is insisted that if the decision in this case should stand, the decision in that case ought to be overruled.

From the opinion in the *Fisher* case, it is difficult to determine what questions are authoritatively decided. The facts in that case, as stated in the opinion, show that the land in Minnesota had been conveyed and reconveyed by and to citizens residing in the State of Indiana by warranty deeds; that there was an older mortgage upon the land of record in Minnesota, upon which it was sold, deeded, and possession taken under the deed. These facts showed a breach of the covenant of seizin, as well as that against encumbrances. The opinion then quotes two sections of the statute of Minnesota, as follows:

“Section 5. No covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not.”

“Section 35. Whoever conveys real estate by deed or mortgage, containing a covenant that it is free from all encumbrances, where an encumbrance appears of record to exist thereon, whether known or unknown to him, shall be liable in an action of contract to the grantee, his heirs, executors, administrators, successor or assigns, for all damage sustained in removing the same.”

The opinion then holds that the law of Indiana, where the deeds were made, shall govern in the interpretation of the contract. In the opinion it is then said: “The deed set out in the complaint contains the words ‘convey and warrant,’ which, by the statute, contain the covenant against encumbrances, which is a personal covenant, and, under the facts set out in the complaint, Kinnan could have undoubtedly maintained an action against Fisher for a breach of this covenant.

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But the statute of Indiana makes the deed contain more than the personal covenant against encumbrances; it contains, by the statute, a covenant for quiet possession. This latter covenant is *in futuro*, and runs with the land. By the statute of Minnesota, no such covenant is contained in the deed. Parry could maintain an action against Fisher only on some covenant running with land, as it is well settled that an assignee of a vendee can not maintain an action against the vendor of his vendee on the breach of a covenant purely personal. In determining whether a conveyance of real estate contains a covenant that runs with the land, the *lex rei sitæ* governs."

The most that we can make of this decision is, that there are no implied covenants under the statute of Minnesota, and that where the words "convey and warrant" only are used, the implied covenants made by the statute of Indiana can not be enforced as to lands conveyed which are in Minnesota; and that the implied covenants made by the statute of Indiana in such a case thereby become personal covenants, and this includes the implied covenant of seizin, as well as that against encumbrances. There was no reason for saying that the covenant against encumbrance was personal, any more than that the implied covenant of seizin in that case was also personal. If that decision be correct in saying that the covenant against encumbrances in that case was a personal covenant, it is based alone upon the fact that the statute of Minnesota upon this subject is different from the statute of Indiana, and the original opinion herein is correct, in distinguishing that case from the one under consideration, by the difference in the statutes.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

Filed April 8, 1885.

Jennings, Guardian, v. Durham et al.

No. 11,337.

JENNINGS, GUARDIAN, v. DURHAM ET AL.

PRACTICE.—*Bill of Exceptions.*—Where it affirmatively appears in the body of a bill of exceptions that evidence was given on the trial which is not contained in the bill, the general recital that "this was all the evidence given in the cause" will not control.

SAME.—*Equity Cases.—Effect of Answers of Jury to Interrogatories.*—The court is not bound by the answers of the jury to interrogatories submitted to them in cases of equitable cognizance.

From the Clay Circuit Court.

D. R. Eckles, J. J. Smiley and W. G. Neff, for appellant.

D. E. Williamson and A. Daggy, for appellees.

ELLIOTT, J.—The appellees vigorously insist that the evidence is not all in the record, and upon an examination of the bill of exceptions we find that they are correct in affirming that it does not contain all of the evidence. There are more than ten statements in the bill of exceptions, that items of evidence were introduced, followed by statements showing that these items are not contained in the bill of exceptions. We are compelled by the long settled rule of the court to hold that notwithstanding the general statement in the bill of exceptions, "that this was all the evidence given in the cause," the evidence is not all in the record. *Collins v. Collins*, 100 Ind. 266; *Fellenzer v. Van Valzah*, 95 Ind. 128, and authorities cited.

The case before us is one requiring that all the evidence should be in the record, for, in the absence of the evidence, we can not determine that there was error in the decision of the trial court upon the appellant's motion for a new trial. The presumption is in favor of the judgment of the lower court, and the party who alleges error must present such a record as affirmatively shows that its rulings were wrong.

The only error properly assigned is that the court erred in overruling the motion for a new trial, and as the question whether the decision of the court was right or wrong de-

101	391
130	428
101	391
142	441
101	391
146	114
147	301
101	391
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pend upon the evidence, we can not, in the absence of the evidence, review the ruling denying the motion.

The cause was one of equitable cognizance, and the court was not bound by the answers of the jury to the interrogatories submitted to them. In such cases the court has a right to disregard the finding of the jury and determine for itself the case upon the evidence. *Israel v. Jackson*, 93 Ind. 543; *Pence v. Garrison*, 93 Ind. 345; *Lake Erie, etc., R. W. Co. v. Griffin*, 92 Ind. 487.

Parties can not make questions in this court respecting the procedure on the trial not made in the court below. As no question was there made upon the action of the court disregarding the finding of the jury, none can be made here.

Judgment affirmed.

Filed April 4, 1885.

No. 10,247.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, v. THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE.

INSURANCE.—*Mortgage Clause*.—*Change of Ownership*.—*Increase of Hazard*.—*Commencement of Proceeding to Foreclose*.—*Notice*.—The mere commencement of a proceeding to foreclose a mortgage, without notice to the insurer, is not of itself such a "change of ownership or increase of hazard" as will avoid a contract of insurance made for the benefit of the mortgagee, within the meaning of a stipulation in the mortgage clause of the policy for notice from such mortgagee of a change of ownership or increase of hazard.

From the Marion Superior Court.

B. Harrison, C. C. Hines and W. H. H. Miller, for appellant.
S. Claypool and W. A. Ketcham, for appellee.

Howk, J.—In this case the appellee, the Union Mutual Life Insurance Company, alleged in its complaint that the appellant, the Phenix Insurance Company, of Brooklyn,

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New York, on the 20th day of March, 1878, executed and issued its certain policy of insurance in the name of Priscilla J. Death, insuring her, Priscilla J. Death, against loss or damage by fire to the amount of \$1,500, on her one and a half story frame and shingle-roof dwelling-house, situated on her lot on the southwest corner of Washington and Corey streets, in Knightstown, Indiana; that such policy was issued in consideration of a premium of \$30 paid to the appellant by the appellee, who was mortgagee of such property, and by the terms of such policy, it was made payable to the appellee in case of loss; that the appellee was then the holder of such policy, it having been issued by the appellant to the appellee who had, as above stated, a mortgage on such property to secure the payment of \$1,500, then and since unpaid; that such property was destroyed by fire, on the 21st day of March, 1878, and the property so destroyed was of the value of \$1,500, and was a total loss, which loss the appellant undertook and promised to pay to the appellee sixty days after the proof of loss, and notice thereof to the appellant; that forthwith, after such loss, the appellant was notified of the loss, and the terms and conditions of the policy were, in all things, kept and performed by the appellee and by Priscilla J. Death, except as to this, Priscilla J. Death having failed and refused to make the proof of loss in her name, the proof of loss was therefore made by the appellee, but such proof was, in all things, in substance as required; that after the loss and proof thereof, the appellee enclosed to the appellant a particular statement and account of such loss, etc. And the appellee further alleged that the appraiser appointed to appraise the damage to such property, under the terms of such policy, appraised such damage at the sum of \$1,050, and that appellee had been damaged in the sum of \$1,500, which sum remained due and unpaid. A copy of such policy was filed with and made a part of the complaint. Wherefore, etc.

Appellant answered specially in three paragraphs, numbered respectively the *third*, *fourth* and *fifth* paragraphs, to

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each of which the appellee's demurrer, for the alleged want of facts, was sustained by the court. Appellant refused to amend or plead further, and the court upon the evidence assessed the appellee's damages in the sum of \$1,218, and rendered judgment accordingly. On appeal, the general term affirmed the judgment at special term, and from the judgment of the general term this appeal is now here prosecuted.

The only error relied upon, in argument, by the appellant, is the sustaining of the demurrer to the third paragraph of its answer. Under the settled practice of this court, the other errors assigned in general term are regarded here as impliedly waived.

In the third paragraph of its answer, the appellant alleged that in and by the terms of the policy in suit, it is provided, among other things, that in the event of the commencement of foreclosure proceedings against the premises insured, or if the risk be increased by any means whatever within the control of the insured, without the appellant's consent endorsed on such policy, then and in every such case the policy should become void. And the appellant averred that after such policy was so issued, and after the mortgage clause was so inserted for the benefit of the appellee, the appellee caused, without any notice whatever to the appellant, a suit for the foreclosure of such mortgage to be commenced in the circuit court of the United States, for the District of Indiana, a court having jurisdiction to hear and determine such matter, and was prosecuting such suit at the time such loss occurred, without the knowledge or consent of the appellant; whereby the risk of loss by fire to such property was greatly increased, and thereby, by the terms of such policy, such contract of insurance became void.

The part of the mortgage clause, inserted in the policy in suit for the appellee's benefit, upon which the third paragraph of answer seems to have been founded, reads as follows:

"It is hereby agreed that this insurance, as to the interest of the mortgagees only therein, shall not be invalidated by

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any act or neglect of the mortgagor or owner of the property insured, or by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further agreed that the mortgagees shall notify said company of any change of ownership or increase of hazard which shall come to his knowledge, and that every increase of hazard not permitted by the policy to the mortgagor or owner, shall be paid by the mortgagees on reasonable demand, according to the established scale of rates for the use of such increased hazard, during the then current year."

The third paragraph of answer proceeds upon the theory that the commencement of the suit by the appellee and mortgagee to foreclose its mortgage, of itself, so greatly increased the risk of loss by fire to the property insured, as necessarily to avoid the contract of insurance. No authority is cited in support of this theory, and we know of none, and we are certain, that under the agreements in the mortgage clause, such a theory can have no application to the case in hand. Here the appellant stipulated in the mortgage clause that it should be notified by the appellee "of any change of ownership or increase of hazard" which should come to the latter's knowledge. The appellant was bound to know that, under the laws of this State, if default were made by the mortgagor in the payment of the mortgage debt, the appellee could enforce its mortgage in no other manner than by "foreclosure proceedings against the premises." While it is true that such foreclosure proceedings might ultimately, after a litigation more or less protracted, lead to a change of ownership of the premises insured, yet it is equally true that the mere commencement of such proceedings can not be regarded, in any sense, as tantamount to or the equivalent of the "change of ownership" mentioned in the mortgage clause. Besides, it may well be supposed that if the appellant had desired to be notified of the commencement of foreclosure proceedings, or had supposed that the mere commencement of such proceedings

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would increase the hazard of the risk, it would have stipulated for such notice in direct terms in the mortgage clause.

The courts can not assume that the mere commencement of the foreclosure proceedings, of itself, increased the hazard of the risk in the case before us to such an extent as would, in the absence of notice or consent, avoid the contract of insurance. The facts must be averred, from which the inference inevitably follows, that the hazard was greatly increased by the commencement of the foreclosure proceedings. The appellant closed the third paragraph of its answer as follows: "Whereby the risk of loss by fire to the property was greatly increased, and thereby, by the terms of the policy, the contract of insurance became void." This is merely the pleader's conclusion, and the paragraph of answer was bad on demurrer, because the precedent facts averred in the paragraph were not sufficient to authorize any such conclusion, either of law or of fact.

We find no error in the record of this cause.

The judgment is affirmed, with costs.

Filed April 8, 1885.

No. 11,872.

WALKER v. BOYD.

SLANDER.—Evidence.—Variance.—Where slanderous words are laid in a complaint as having been spoken affirmatively, proof that the substance of the same words was spoken interrogatively is a variance, and not admissible.

From the Knox Circuit Court.

J. C. Denny and J. S. Pritchett, for appellant.

MITCHELL, J.—Mary Walker complained of Boyd in the court below, charging that he maliciously spoke of and concerning her the following false and slanderous words, omitting the innuendoes and some immaterial statements: "She

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has been in bed with Joe Walker; she has been sleeping with Joe Walker; she is in the family way with Joe Walker; she is with child by Joe Walker; she has been trying to get rid of her bastard child; Joe Walker has left the county because he has been sleeping with Mary Walker; she is coming up; she has been doctoring and trying to get rid of her bastard child; she is in the family way by Joe Walker, and he has left the State on account of it; she has been sleeping with him, and is now in the family way; she has been trying to get the doctor to get her rid of her bastard child."

Upon a trial by a jury there was a verdict for the defendant.

During the progress of the cause one Commodore Phillipi was called as a witness, and testified as follows: "I am acquainted with the parties to this suit. Shortly before this suit was brought I was at work for the defendant John G. Boyd. He asked me when I saw Mary Walker last. I said I did not know. Boyd then asked me if the story was true that she was in the family way. I said I did not know, and I also said I do not pity her if she is. He then said he heard she had been compelled to wean her child, and was doctoring."

On motion of the defendant this testimony was stricken out and withdrawn from the jury by the court.

Whether this ruling of the court was correct is the only question presented.

The words spoken to the witness by the defendant Boyd, and testified to by him as above set out, do not tend to prove even the substance of any of the words laid in the complaint.

Where slanderous words are laid in a complaint as having been spoken affirmatively, proof that the substance of the same words were spoken interrogatively is a variance, and consequently not admissible. *Yeates v. Reed*, 4 Blackf. 463; *Folkard's Starkie on Slander and Libel*, section 426; *Odgers Libel and Slander*, 471.

The difference between the sense and meaning of the same words, spoken affirmatively, and where they are uttered to another by way of inquiry, may be radical, and while they

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may be slanderous in either case, they must be stated in the complaint in the form in which they were uttered.

All that was said by the defendant to the witness Phillipi, except the last sentence, was by way of inquiry, and this last sentence contained nothing slanderous.

The ruling of the court was correct. Judgment affirmed, with costs.

Filed April 10, 1885.

No. 11,946.

THE STATE, EX REL. WATSON, *v.* THE BOARD OF COMMISSIONERS OF KNOX COUNTY.

MANDAMUS.—*County Commissioners.*—Mandamus will lie against the board of commissioners to compel the performance of a duty specifically imposed by law.

SAME.—*Railroad.—Tax in Aid of.*—It is not the duty of the board of county commissioners to cause a tax levied in aid of a railroad company to be placed upon the tax duplicate, and mandamus will not lie.

From the Knox Circuit Court.

F. W. Viehe, M. J. Niblack, G. G. Reily, W. C. Niblack, W. H. De Wolf and S. N. Chambers, for appellant.

W. A. Cullop, G. W. Shaw and C. B. Kessinger, for appellee.

ELLIOTT, J.—The complaint of the relator alleges that he is a freeholder of Vincennes township, Knox county, and that he united with twenty-five other freeholders named, in a petition to the board of commissioners, praying that an election be ordered in that township to take the sense of the voters on the question of subscribing for the township the sum of \$90,000 to the capital stock of the Vincennes and Ohio River Railroad Company, a corporation duly organized under the laws of Indiana, for the purpose of aiding it in constructing its railroad through the township; that the board of commissioners took the petition under advisement, and afterwards, on the 8th day of March, 1883, ordered that

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an election should be held on the 26th day of April, 1883; that the commissioners also ordered that notice of the election should be published for four successive weeks in a newspaper of general circulation, and by posting printed handbills. It is further alleged that notices were given as ordered; that the election was held at the time designated; that a majority of the votes were cast in favor of making the appropriation; that due returns were made and the necessary certificates properly filed, and that the board of commissioners examined the returns and certificates at the June session, 1883, and decided that the majority of the voters had cast their votes in favor of the appropriation, but ordered that the matter be continued for the reason that the railroad had not been permanently located through Vincennes township. It is still further alleged that the company did file a map and profile of its road as permanently located in the township, on the 1st day of June, 1884, and that George F. Montgomery petitioned the board at its regular session in June, 1884, to place one-half of the amount of the tax authorized by the voters upon the tax duplicate, and that the board rejected the petition. The prayer of the complaint is as follows: "Wherefore plaintiff prays that an alternative writ issue from this court against said board of commissioners requiring said board to show cause why said tax should not be placed upon the tax duplicate; and, upon the final hearing, that said board of commissioners be required and ordered by the proper mandate of this court to place said tax upon the tax duplicate, and for all other proper and necessary relief in the premises."

The theory of the complaint, evidenced by its frame and tenor as well as by its prayer, is that the board is charged with the duty of causing the tax to be placed upon the duplicate, and that it has refused to perform this duty. The petition filed by Montgomery asked the board to cause the tax to be entered on the duplicate, and asked nothing more, and this was the act which the board refused to perform. The

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complaint, therefore, proceeds on a definite theory, and the question for our decision is, whether it is sufficient on the theory upon which it is constructed. *Johnston v. Griest*, 85 Ind. 503; *City of Logansport v. Uhl*, 99 Ind. 531; *Cottrell v. Aetna L. Ins. Co.*, 97 Ind. 311, *vide* p. 313; *Western Union Tel. Co. v. Reed*, 96 Ind. 195.

A mandate will lie against an inferior tribunal to enforce performance of a specific duty, but it will not lie where there is no specific duty enjoined upon the tribunal by law. If, therefore, the law enjoins upon the board of commissioners the duty of causing the tax to be placed upon the duplicate, then this suit is well brought; if not, then it can not be maintained.

We have carefully searched the statutes respecting the assessment of taxes to aid railroads, but have been unable to find any provision making it the duty of the board of commissioners to cause the tax to be placed upon the duplicate. It is evident that counsel for the relator have also made a thorough search, and have discovered no provision upon the subject. They call our attention to special statutory provisions directed to particular subjects, and ask us to extend them to cases like this, but this we can not do without a plain violation of settled rules.

We think it is the auditor of the county, and not the board of commissioners, who is charged with the duty of placing the tax upon the duplicate. It is the duty of the board to make levies and assessments, and when this duty is performed it is the duty of the auditor to place the tax upon the duplicate of the county according to law. It is not averred that the board did not do its duty in levying or assessing the tax, and, as is the case with all public officers, the presumption is that the commissioners did their duty. The only failure shown by the complaint is that of the auditor, not that of the commissioners, and against the latter this action can not be maintained. Judgment affirmed.

NIBLACK, J., did not take part in the decision of this cause.

Filed April 8, 1885.

Brownlee v. The Board of Commissioners of Grant County.

No. 12,127.

BROWNLEE v. THE BOARD OF COMMISSIONERS OF GRANT
COUNTY.

JUDGMENT.—*Amendment of.*—*Mistake.*—In a proceeding to amend a judgment rendered nearly two years previously, in favor of various persons, from which, it is alleged, the plaintiff's name was omitted by mistake, such mistake must be clearly shown.

SAME.—*Evidence.*—*Supreme Court.*—*Practice.*—*Presumption.*—In such case evidence other than the record is admissible to show the alleged mistake; but where the trial court refuses to hear such evidence, the Supreme Court will, in its absence from the record, presume that the ruling was right.

From the Grant Circuit Court.

J. Brownlee, for appellant.

A. Steele and *R. T. St. John*, for appellee.

BEST, C.—The appellant, on behalf of himself and more than one hundred other persons, all taxpayers of Grant county, brought an action against the commissioners of the county to recover certain taxes alleged to have been illegally collected from them by the treasurer of said county, under an assessment made by him in 1878, for previous years. Such proceedings were had as resulted in a judgment awarding one hundred of such persons the various sums paid by them respectively under such assessment. The judgment, as entered, did not embrace the appellant and about a dozen other persons named in the complaint, and nearly two years thereafter the appellant, on behalf of himself and such other persons, moved the court to amend the judgment so as to embrace himself and such other persons, and to specify the amounts awarded to each of them. This motion was overruled, and from such ruling this appeal has been taken.

The ground of the motion was that the clerk in entering the judgment, by mistake, omitted the names of these persons and the respective amounts awarded them from the judgment.

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The evidence is in the record. It consists of the complaint, answer and the various entries made by the clerk during the progress of the cause. These utterly fail to show the alleged mistake. It appears that after the issue was formed the court appointed John P. Campbell a special master commissioner to report the amount of taxes paid by each of the persons named in the complaint, and that such report was afterwards made and filed. Thereupon the action was dismissed as to all persons not named in the report. This report, though a paper in the cause, was not read in evidence, and in its absence we can not say that the action was not dismissed as to all who now seek an amendment of the judgment. If their names were not in the report, the action was dismissed as to them, and of course no judgment was recovered by them or either of them. In this condition of the record, it was necessary for these persons to show that their names were included in such report, and in the absence of such showing the evidence did not authorize an amendment of the judgment.

The appellant also insists that the court erred in refusing to receive any extrinsic testimony of such alleged mistake. If the action was dismissed, no available error could thus have been committed. Aside from this, no such evidence was offered. The record recites that the court "refuses to hear any evidence" except the complaint, entries, etc., but it nowhere appears that any was offered. If the appellant had no other legitimate evidence, the ruling was right, though evidence other than the record is admissible to show such alleged mistake. In the absence of the evidence refused, if any, we can not say that the ruling was wrong, but on the contrary must presume that it was right. *Myers v. Murphy*, 60 Ind. 282; *Rucker v. Steelman*, 97 Ind. 222.

For these reasons, we think the court did not err in overruling the motion, and that its order should be affirmed. This conclusion renders it unnecessary for us to express an opin-

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ion upon the right of appellant to maintain this proceeding on behalf of the other persons named.

PER CURIAM.—The order of the court in overruling the motion is, therefore, affirmed, at appellant's costs.

Filed April 10, 1885; petition for a rehearing overruled April 25, 1885.

No. 11,922.

DUNCAN v. THE BOARD OF COMMISSIONERS OF LAWRENCE COUNTY.

COUNTY COMMISSIONERS.—*Claim Against County.—Pleading.*—A statement of a claim which is sufficient to inform the board of commissioners of what is demanded, and to bar another claim for the same thing, without averring all the facts necessary to be proved in order to establish the claim, is sufficient on motion to dismiss, both before such board and in the circuit court on appeal.

SAME.—*Contract to Examine Treasurer's Accounts.*—The board of county commissioners have power to contract for an examination and adjustment of the accounts of the county treasurer, and an action may be maintained against the county on such contract.

From the Lawrence Circuit Court.

G. W. Friedley, E. D. Pearson, J. W. Buskirk and H. C. Duncan, for appellant.

W. H. Martin, for appellee.

FRANKLIN, C.—Appellant filed a claim against the county for services, under a contract with the board of commissioners, in examining and reporting the condition of the accounts of the late treasurer of said county, and for damages for a breach of the contract by the board of commissioners.

On motion of appellee's counsel the claim was dismissed by the board of commissioners. Appellant appealed to the circuit court, where, upon the renewal of the same motion, the claim was dismissed in the circuit court, and the claimant

101	408
120	8
101	408
141	482
143	370
101	408
148	148
101	408
155	172
101	408
157	110
101	408
164	607

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has appealed to this court. The error assigned is the sustaining of the motion to dismiss the action.

The reasons stated in the motion to dismiss are that there is no sufficient claim or cause of action on file, and that the plaintiff has not filed a succinct statement or account of his claim against the defendant.

The claim sets forth the written contract executed by the parties, the order of the board of commissioners declaring that there was an indispensable public necessity for an examination and adjustment of the accounts of said treasurer, and appointing appellant to make such examination and report the result thereof to the board of commissioners, all of which are made parts of the claim by exhibit. It then alleges the commencement of the work, the violation of the terms of the contract by the board of commissioners, and states the report to the board of commissioners of the progress of the work, and the rescission of the contract and order approving it by the board of commissioners, which report and order of rescission are made parts thereof by exhibit. It then claims pay for the services rendered, and damages for the breach of the contract, all of which was verified.

We think this claim contains the substance of a good complaint in the circuit court, and while it might be subject to a demurrer, it certainly would not justify the dismissal of the cause.

Pleadings before the county board of commissioners do not require that technical strictness and fulness as is required in the circuit court. A statement of the claim sufficient to inform the board of what is demanded, and that will bar another claim for the same thing, without averring all the facts necessary to be proved in order to establish the claim, is sufficient. See the following authorities: *Board, etc., v. Wood*, 35 Ind. 70; *Board, etc., v. Shrader*, 36 Ind. 87; *Board, etc., v. Loeb*, 68 Ind. 29; *Board, etc., v. Adams*, 76 Ind. 504; *Board, etc., v. Ritter*, 90 Ind. 362; *Board, etc., v. Armstrong*, 91 Ind. 528; *Board, etc., v. Gillum*, 92 Ind. 511; *Board, etc.,*

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v. *Dombke*, 94 Ind. 72; *Board, etc., v. Emerson*, 95 Ind. 579.

It is further insisted that the board of commissioners had no power to make such contract, that its action therein was *ultra vires*, and that there was no error in dismissing the case.

The constitution provides that county commissioners may be invested with local administrative powers, and the statute invests them with authority over the business affairs and property of the county. R. S. 1881, sections 160 and 5745.

The third clause of the second named section expressly gives said board the power "To audit the accounts of all officers having the care, management, collection, or disbursement of any moneys belonging to the county or appropriated for its benefit."

The board of commissioners have very full powers in reference to the management of the affairs of their respective counties. It is, for all financial purposes, the county, and its contract in relation to the adjustment of the finances of the county is the contract of the county, and valid as such. See the cases of *Hoffman v. Board, etc.*, 96 Ind. 84, and *Moon v. Board, etc.*, 97 Ind. 176. Also *Nixon v. State, ex rel.*, 96 Ind. 111.

The complaint herein shows that appellant commenced the work under the contract, and worked thereunder two days; that by the terms of the contract he was to receive \$5 per day; that the board then failed and neglected, as stipulated by the contract, to furnish him with the necessary books and papers to be examined; that the treasurer locked them up in his safe and refused to allow them to be examined; that it would have taken seven months to have completed the work as contracted for, and that any other work that he could have obtained during said time would not have yielded more than \$1 per day; that he was at all times ready and willing to do the work in accordance with the terms of the contract; and that without his consent the board rescinded the contract, and

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refused to let any further work be done under it; that he was damaged by the said breach of the contract.

If the complaint could be held subject to a demurrer or a motion to make it more specific, that would not be a sufficient reason for dismissing the case. The complaint stated a sufficient cause of action for some amount, and how much was to be determined by the evidence at the trial. He was entitled to a hearing on his complaint, and the court erred in dismissing the case.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded, with instructions to the court below to reinstate the case, and for further proceedings.

Filed April 23, 1885.

No. 12,243.

HUNTER v. THE STATE.

CRIMINAL LAW.—*Practice.—Bill of Exceptions.*—In criminal cases, leave to file a bill of exceptions must be asked and obtained during the trial, and leave asked and obtained ten days after final judgment is too late, as the judgment terminates the trial.

From the Warren Circuit Court.

J. McCabe and *E. F. McCabe*, for appellant.

F. T. Hord, Attorney General, *W. B. Hord* and *J. G. Pearson*, for the State.

ELLIOTT, J.—The only question argued by appellant's counsel arises upon the instructions of the court which are embodied in a paper purporting to be a bill of exceptions. The State contends that there is no valid bill of exceptions in the record, and that, consequently, no question is properly presented.

101	406
140	445
141	465
141	596
101	406
144	11
101	406
152	297
101	406
157	114
101	406
162	177

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On the 13th day of January, 1885, a verdict was returned against the appellant, and on that day a motion for a new trial was overruled and judgment pronounced on the verdict. On the 22d day of that month the appellant replevied the judgment rendered against him, and on the 23d he asked and obtained leave to file a bill of exceptions. The contention of the State is that the court had no authority to grant leave to file a bill of exceptions after final judgment was pronounced and entered, and counsel refer to the provision of the statute which reads as follows: "All bills of exceptions, in a criminal prosecution, must be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding sixty days from the time judgment is rendered." R. S. 1881, section 1847. In the case of *Jenks v. State*, 39 Ind. 1, the question was thoroughly examined, and it was said: "We are of the opinion that the word trial, as used in the above section, was not used in its limited and restricted sense, but in a general sense, and includes all the steps taken in the cause from the submission of the cause to the jury to the rendition of judgment." This was the broadest meaning, as is evident from the reasoning of the court and from the authorities cited, that could be given the word, and, giving it even this broad meaning, the request of the appellant for leave to file a bill of exceptions came too late, for it was not made until ten days after the case had been disposed of by a final judgment. In *Bruce v. State*, 87 Ind. 450, the provision of the statute referred to came under review, and the decision in *Jenks v. State*, *supra*, was approved, and it was held that if leave was obtained before the judgment was rendered, it would be effective; but the reasoning clearly leads to the conclusion that the leave must be obtained before the termination of the cause by a final judgment. In defining the meaning of the word "trial," it was said in *Sturgeon v. Gray*, 96 Ind. 166, that "The word 'trial,' as used in the above section, must be held to include all the steps taken in the cause,

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from its submission to the jury to the rendition of the judgment." These authorities lead to the conclusion that the trial is terminated by the final judgment, and that the leave to file a bill must be obtained before the judgment, or at least concurrently with its entry.

The statute provides that "The exceptions must be taken at the time of the trial," and the general policy of the law is to secure the prompt statement of exceptions and their incorporation in a bill of exceptions. It is only by force of the statute authorizing the court to grant time to file bills of exceptions that courts have a right to grant it; but for this statutory authority it would be necessary to take the bill at the time of making the exceptions. The authority to grant time must be exercised in the manner prescribed by the statute, and the statute requires that the bill shall be filed or leave obtained before the final conclusion of the trial. We do not think the court has authority, as a matter of course and without good cause shown, to grant leave to file a bill of exceptions ten days after the final judgment has ended the trial and disposed of the cause. The most liberal construction that can justly be given this statute is that the defendant, during the trial, may either present a bill of exceptions to the judge, or, during the trial, may obtain leave to file it within such time as the court may grant, and that the trial is only terminated by the final judgment entered in the cause.

Judgment affirmed.

Filed April 11, 1885.

No. 12,260.

ROBERTS ET AL. v. GIERSS.

DRAINAGE.—*Report of Commissioners.*—*Expense and Benefits.*—Under section 2 of the act of March 8th, 1883 (Acts 1883, p. 173), the commissioners of drainage are only required to report that the estimated expense of the proposed drain will be less than the supposed benefits, and the dif-

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ference between a total expense of \$2,855 and aggregate benefits of \$2,912 is sufficient.

SAME.—Practice.—Supreme Court.—An objection to the confirmation of the report of commissioners of drainage can not be raised for the first time in the Supreme Court.

From the Tippecanoe Circuit Court.

W. C. Wilson and J. H. Adams, for appellants.

B. F. Hegler, W. S. Potter and A. A. Rice, for appellee.

NIBLACK, J.—In December, 1883, George Gierss, the appellee, filed his petition in the Tippecanoe Circuit Court under the first section of the act concerning drainage, approved March 8th, 1883 (Acts 1883, p. 173), for the construction and establishment of a ditch, commencing in Tippecanoe and extending into Fountain county. Frederick M. Roberts and his co-appellant, with many others, were made respondents to the petition. Such proceedings were thereupon had as resulted in the reference of the petition to the commissioners of drainage of Tippecanoe county. These commissioners, after making an examination of all the lands which would probably be affected by the construction of the proposed ditch, reported, amongst other things, that certain highways, describing them, would be benefited by the contemplated work, and that the work could be accomplished at an expense less than the aggregate benefits, estimating the total expense at \$2,855, and the aggregate benefits at \$2,912; also submitting a list of the lands which it was supposed would be benefited by the ditch, with an assessment against each particular tract. Some of the lands included in this list, and against which assessments were made, were not embraced within the petition, and were not either upon, or immediately contiguous to, the line of the contemplated ditch.

Roberts, and other appellants, remonstrated against the report of the commissioners: *First*. Because lands were assessed which were not embraced within the petition, and were not within the jurisdiction of the court. *Second*. Because certain described lands belonging to the remonstrants, and not named

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in the petition, were assessed too much as compared with assessments against other lands included in the report. *Third.* Because the drainage proposed would neither improve the public health nor any highway, and would be of no public utility. *Fourth.* Because the lands of the remonstrants were assessed for too much as compared with the assessment made against the lands of the petitioner. *Fifth.* Because the expense of constructing the ditch as proposed would be largely in excess of the benefits which would result from its construction, thus rendering the scheme an impracticable undertaking.

After hearing evidence in support of the remonstrance, the circuit court overruled the objections interposed by it, confirmed the report made by the commissioners, and ordered the construction of the ditch as recommended by the report.

It is claimed in argument that the circuit court ought to have set aside the report of the commissioners of drainage, for two reasons: *First.* Because the difference between the estimated expense of constructing the ditch and the supposed benefits to result from its construction was too trivial to justify the conclusion that such expense would in the end be really and substantially less than the benefits in question. *Secondly.* Because it was affirmatively shown by the evidence that some of the lands, against which the commissioners made assessments, would not be directly benefited by the ditch, and could only be so benefited by the digging of lateral ditches.

It is only required that the commissioners shall report that the estimated expense shall be *less* than the supposed benefits. Acts 1883, p. 174, section 2. That the commissioners did in this case both generally and specially. There was a substantial difference, we think between the two amounts respectively named. The first objection urged here to the report can not, therefore, be sustained.

As to the second objection, it will be seen by a recurrence to the specifications contained in the remonstrance, that no such question as that now presented in this court was raised

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in the circuit court; hence we need not inquire what the evidence either established, or tended to establish, on the subject of supposed direct benefits to particular tracts of land. See section 3 of the act of 1883, as to objections which may be made to a report by remonstrance.

The judgment is affirmed, with costs.

Filed May 2, 1885.

No. 12,181.

GALLAHER ET AL. v. THE STATE.

CRIMINAL LAW.—*Practice.*—*Indictment.*—*Motion to Strike Out.*—A motion to strike out part of an indictment is not recognized by the rules of practice in criminal cases.

SAME.—*Instructions.*—*What Record Must Contain.*—Instructions are regarded as an entirety, and where error is alleged in the giving of instructions the record must show that there was error in the instructions taken as a whole. It is, therefore, necessary for the record to contain so much of the instructions at least as affirmatively shows error, and the better practice is to embody all the instructions in the record.

SAME.—*Evidence.*—*Riot.*—*Res Gestæ.*—The acts and declarations of persons engaged in the commission of a riot are admissible against them as part of the *res gestæ*, although such evidence may also show the malicious destruction of property.

From the Clinton Circuit Court.

J. V. Kent, J. Bradley and W. R. Moore, for appellants.

F. T. Hord, Attorney General, and W. B. Hord, for the State.

ELLIOTT, J.—The appellants were tried and convicted upon an indictment charging them with having engaged in a riot.

The rules of criminal procedure do not recognize the right of an accused to move to strike out part of an indictment. There is no necessity for such a motion. If the matter objected to is mere surplusage it does no harm; if it is material it makes the indictment double, and for that vice the remedy is a motion to quash.

101	411
130	472
101	411
135	249
101	411
149	406
151	499
151	500

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What is said and done by persons during the time they are engaged in a riot constitutes the *res gestæ*, and it is, of course, competent to prove all that is said and done. If the violent or disorderly conduct of the rioters results in injury to property, and the act causing the injury is committed during the riot, the State may prove the act which caused the injury. This evidence is not admitted for the purpose of establishing another offence, but because it is part of the occurrence which constitutes the riot and tends to show that the conduct of the defendant was riotous and violent.

Only two of the instructions given by the court are brought into the record, the ninth and the eleventh, and we are not able to say that any error was committed in giving them, for, if they had been accompanied by other instructions correctly expressing the law, there would have been no error, as the utmost that can be urged against these two instructions is that they are somewhat obscure and incomplete, and these are defects which the other instructions might have fully remedied. It is well settled that instructions are to be regarded as an entirety, and if, when so regarded, they express the law correctly, and without material contradiction, there is no error. *Goodwin v. State*, 96 Ind. 550, and auth.; *Kirland v. State*, 43 Ind. 146; S. C., 31 Am. R. 386. We are bound to presume that the other instructions given by the trial court did express the law correctly, and the imperfections and obscurities in those brought into the record were removed by the other instructions given by the court. It would be illogical to judge of the meaning of a series of eleven or more instructions by making an inspection of two only of the series. The safer practice is to bring all of the instructions into the record. There may, perhaps, be cases where this court could decide that there was error in giving instructions without having all the instructions before it, but the case that would warrant such a course must be an extraordinarily strong one.

Judgment affirmed.

Filed April 10, 1885.

D. S. Morgan & Co. v. White.

No. 11,841.

101 413
164 463

D. S. MORGAN & CO. v. WHITE.

DISCRETION OF COURT.—*Withdrawal of Pleading.—Practice.*—It is within the discretion of the trial court to permit a plea in bar to be withdrawn and a plea in abatement to be filed.

FOREIGN CORPORATIONS.—*Filing Authority of Agents with County Clerk.—Statute Construed.*—Sections 3022 and 3023, R. S. 1881, providing that the agents of a foreign corporation, before entering upon their business as such, shall file evidence of authority with the clerks of the counties in which it is proposed to do business, contemplate only such agents as propose to transact, within this State, the business in which the corporation is engaged, and do not apply to persons who are engaged in appointing agents to do its business.

From the Benton Circuit Court.

J. W. Cole, for appellant.

D. E. Straight, U. Z. Wiley and S. F. Carter, for appellee.

MITCHELL, J.—D. S. Morgan & Co., a foreign corporation, engaged in the business of manufacturing and selling mowing and reaping machines, appointed Charles L. White its agent, to transact its business at Ambia and vicinity, in Benton county.

He was constituted agent for two consecutive years, by two separate contracts, the first dated December 10th, 1880, and signed for the corporation by "C. F. Mulligan;" the second dated December 22d, 1881, signed for the company by "L. C. Bartley, manager."

These contracts stipulated that White was constituted the agent of the corporation for the sale of its wares at a stipulated commission, in the town of Ambia and vicinity, the agent agreeing to guarantee the payment of all notes taken by him for goods which he should sell in the course of his agency unless the purchaser would endorse on the back of the note a property statement, indicating that he was worth a stipulated sum in real and personal estate over and above his indebtedness.

D. S. Morgan & Co. v. White.

This suit was brought to recover for an alleged breach of both of the contracts above mentioned.

After overruling separate demurrers to each paragraph of the complaint, the record recites that the defendant filed an answer in six paragraphs, only four of which appear in the transcript.

There were pleas in bar of the action. Subsequently, the answers were all withdrawn by leave of court, and a plea in abatement was filed.

The substance of this plea is that the plaintiff, at the time of making the several contracts sued on, was a foreign corporation, organized and doing business in the State of New York; that one of the contracts sued on was entered into by the defendant, White, with the company, in Benton county, Indiana, through L. C. Bartley, "who was at that time the duly authorized and acting manager or agent of said company," and the other contract was executed on the part of the plaintiff by one Charles F. Mulligan, "who was the agent for said plaintiff."

It was then averred "that at the time said contracts were executed the said agents, or no one for them, had complied with sections 3022 and 3023, R. S. 1881, in this, to wit, that said agents did not, before the making of said contracts, nor has at any time since, filed in the clerk's office of Benton county, Indiana, where said business was transacted, the power of attorney, commission or other authority," etc.; setting forth specifically the failure to file the several papers required by both of the above mentioned sections.

The court overruled a demurrer to this plea, and the plaintiff standing by his demurrer, the defendant had judgment for costs.

The provisions of the foregoing sections of the statute are only applicable to persons who propose to engage in business within this State as agents for foreign corporations. Accordingly, it is provided that before entering upon their business

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as agents they shall file certain papers with the clerk of the county in which they "propose doing business."

The legislative policy, as indicated by the act, is plain, and was intended to accomplish the double purpose of affording those interested the opportunity of ascertaining the extent of the agent's authority, by requiring that a copy of the instrument appointing him should be filed in a public office in the county in which he proposed to conduct the business of the foreign corporation, as well as to require the corporation to indicate its willingness to submit to the jurisdiction of the courts in any litigation arising out of any transaction with such agent, by consenting that service of process on the agent should be good service on the corporation.

It is clearly implied in the sections referred to, that the agency contemplated is one which may have some degree of permanency and involve transactions by an agent in the conduct of the business of the corporation who has some sort of residence or abode in the State. No policy could be subserved by requiring a non-resident manager or agent of a foreign corporation, who came to this State for the purpose of appointing agents here and there in the State, to file a copy of his authority in each county in which an agent was appointed, or to file the consent of the company that service of process might be made on him in each county where an agent was appointed, where neither the one act nor the other would serve any purpose whatever.

Presumably, the purpose of appointing local agents to do business of the corporation was because the manager or general agent did not find it compatible with the interests of the foreign corporation to remain in the State himself, and in his absence, after accomplishing his business, what the extent of his authority was could be of no concern, and being absent, presumably a non-resident, no service of process could be made upon him even if consent had been filed.

The plea avers that the contracts of agency were executed in Benton county, but it does not aver that the agents who

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executed them for the company were "doing business" or proposing to do business for the corporation in that county or anywhere else in the State.

It does not appear but that the appointment of the appellee agent was the only transaction each ever engaged in, or ever proposed to engage in, in this State. Besides, we think the agents contemplated by the statute under consideration are such agents as propose to transact within this State the business in which the corporation is engaged, and that it has no application to persons who are engaged in appointing agents to do its business. It may be necessary to appoint agents to do the business of a corporation, but appointing agents can hardly be said to be the business of any corporation in the sense of the statute. This is plain from the reading of sections 3022 and 3023, and that there might be no mistake about it section 3027 was enacted.

The plea in abatement should have been certain, bringing the agency clearly within the inhibition of the statute, and because it did not do this the demurrer should have been sustained.

We think it was within the discretion of the court to permit the pleas in bar to be withdrawn, and to give leave to file the plea in abatement; but for the error in not sustaining a demurrer to the plea the judgment is reversed with costs.

Filed April 22, 1885.

No. 11,967.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. FOX ET AL.

EVIDENCE.—*Objections to Admissibility of.*—*Practice.*—Objections to the admissibility of evidence, upon the ground that it is not competent, material or relevant, presuppose a legal traversable issue, and they are to be disposed of upon such assumption.

SAME.—*Jurisdiction.*—*Supreme Court.*—A question as to the admissibility of evidence, based upon the ground that the trial court had no jurisdiction

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of the subject-matter, can not be raised for the first time in the Supreme Court.

PRACTICE.—*Motion in Arrest of Judgment.*—*Pleading.*—A single paragraph of a complaint consisting of more than one can not be assailed by a motion in arrest of judgment.

JUDGMENT.—*Jurisdiction of Subject-Matter.*—*Practice.*—Where the trial court has jurisdiction of the cause of action stated in one paragraph of complaint, but not of that stated in another, and renders judgment upon both, such judgment is not void, and it will be upheld on appeal to the Supreme Court in the absence of any proper objection to the jurisdiction.

NEW TRIAL.—*Excessive Damages.*—*Practice.*—Where a judgment is too large, a new trial should be asked on the ground of excessive damages.

From the Carroll Circuit Court.

W. F. Stillwell, for appellant.

BEST, C.—This action was commenced in the circuit court and was brought to recover the value of animals alleged to have been killed by the appellant upon its road at a point where the same was not securely fenced.

The complaint consisted of two paragraphs. The first sought the recovery of \$35, the value of a heifer, and the second \$80, the value of a colt, killed as alleged. Issue, trial, finding and judgment for \$105. Motions for a new trial and in arrest of judgment were overruled, and these rulings are assigned as error.

The ground of the motion for a new trial, relied upon for a reversal of the judgment, is that the court erred in the admission of certain testimony as to the value and ownership of the heifer, and in refusing to strike out such testimony. The objection made to each question propounded in relation to the heifer was, that the matter sought to be proved was "incompetent, immaterial and irrelevant," and the same reasons were assigned in support of the motion to strike out such testimony. These objections were not well taken, because the testimony was competent, material and relevant in the trial of the issue formed. All such objections presuppose a legal traversable issue, and they are to be disposed of upon

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such assumption. Thus considered, the objections made were properly overruled.

It is also urged here that the court had no jurisdiction of the cause of action stated in the first paragraph of the complaint, for the reason that the value of the heifer was less than \$50, and therefore the testimony in question should have been excluded. The answer to this position is that no such objection was made in the court below, and hence no such question arises here. A party can not resist a ruling below upon one ground and assail it upon another here; nor can he clothe his objection in such general terms as to exclude his real point and for the first time develop it here. The objection must be explicit. This is due the court, and had this rule been observed in this case the appellant would not probably have been compelled to come to this court upon this question. It was not done, and, therefore, the objections made did not raise any question as to the jurisdiction of the court over the subject-matter of the action stated in the first paragraph of the complaint.

The motion in arrest of judgment raises no such question, because the second paragraph of the complaint is unquestionably good, and a single paragraph of a complaint consisting of more than one can not be assailed by a motion in arrest of judgment. Such motions address themselves to the entire complaint, and if a single paragraph is sufficient the motion must fail. A single paragraph of such pleading can alone be successfully assailed by a demurrer.

Nor does the rule that a judgment rendered without jurisdiction of the subject-matter is void, however or whenever it appears, apply in this case, for the reason that the court did have jurisdiction of the cause of action stated in the second paragraph of the complaint, and this will uphold the judgment. The most, then, that can be said is that the judgment was rendered for more than the appellee was entitled to recover upon such cause of action. This appears to be true, but as a new trial was not asked on the ground that the damages assessed

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were excessive, the record presents no such question. The real point intended to be made was that the court had no jurisdiction of the cause of action stated in the first paragraph of the complaint, but as no demurrer was filed, and no such objection made upon the trial, this record presents no such question.

The judgment should, therefore, be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed in all things, at the appellant's costs.

Filed April 23, 1885.

No. 11,552.

LYONS v. TERRE HAUTE AND INDIANAPOLIS RAILROAD
COMPANY.

301	419
184	284
135	533
101	419
136	42

DEMURRER TO EVIDENCE.—*Practice.—Effect of Failure to Prove an Essential Fact.*—A party who has not the burden of proof may demur to the evidence, and if there is an entire failure to prove one fact essential to the existence of the cause of action, the demurrer should be sustained.

NEGLIGENCE.—*Contributory Negligence.—Burden of Proof.*—Where a plaintiff sues to recover for an injury to his property occasioned by the negligence of another, the burden is on him to show that his own negligence did not contribute to the injury.

SAME.—*Railroads.—Killing Cattle.*—Where there is no order of the board of county commissioners allowing stock to run at large, the owner can not recover from a railroad company for cattle killed upon a public crossing.

SAME.—*Matter of Law.*—Where there is no evidence from which it can be inferred that there was an order of the board of commissioners allowing stock to run at large, the court may, as matter of law, conclusively infer negligence.

From the Clay Circuit Court.

S. W. Curtis, for appellant.

J. G. Williams, G. A. Knight and C. H. Knight, for appellee.

ELLIOTT, J.—The cow of the appellant was killed upon a

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public crossing by the locomotive of the appellee. There was no evidence that the board of commissioners had passed an order authorizing cattle to run at large. The appellee demurred to the evidence and the court sustained the demurrer.

Where there is an essential want of evidence, a demurrer by the party not having the burden should be sustained. It is not sufficient that the evidence sustains many points; it must sustain all the points essential to the existence of the cause of action declared on. In such a case as this an essential element in the plaintiff's cause of action is the fact that he was himself free from contributory negligence. It is too well settled to admit of debate that a party who sues for an injury to person or property resulting from negligence must prove that he was himself without negligence. *Cincinnati, etc., R. W. Co. v. Hiltzhauer*, 99 Ind. 486, and authorities cited.

Where there is no order of the board of commissioners allowing cattle to run at large, the common law rule prevails, and an owner is deemed guilty of negligence who permits his cattle to wander upon a public crossing. *Cincinnati, etc., R. W. Co. v. Hiltzhauer*, *supra*; *Wabash, etc., R. W. Co. v. Nice*, 99 Ind. 152; *Indianapolis, etc., R. W. Co. v. Caudle*, 60 Ind. 112; *Cincinnati, etc., R. R. Co. v. Street*, 50 Ind. 225. The question was presented in *Wabash, etc., R. W. Co. v. Nice*, *supra*, as it is here, upon a demurrer to the evidence, and it was decided that the negligence of the owner in allowing his cattle to run at large precluded a recovery, and it was held that the demurrer to the evidence should have been sustained. Where there is no evidence tending to prove an order of the board of commissioners allowing cattle to run at large, the court may, as matter of law, declare that the act of the owner in permitting his cattle to run at large constitutes negligence.

Judgment affirmed.

Filed April 22, 1885.

Crawford v. Powell et al.

No. 11,467.

CRAWFORD v. POWELL ET AL.

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PRACTICE.—*Joint Demurrer.*—A joint demurrer to a pleading consisting of two or more paragraphs should be overruled if any of such paragraphs be good.

MECHANIC'S LIEN.—*Personal Liability to Sub-Contractor.*—The person against whom, under section 5295, R. S. 1881, personal liability for a claim in favor of a sub-contractor furnishing materials for a building might be obtained through notice, and against whom the action provided for in that section could be brought, was the owner of a building for which materials were so furnished and in which they were used; and one not such an owner was not subject to be so made liable though he were personally liable with such owner to the original contractor.

SAME.—*Several Buildings Separately Owned.*—The owner of one of two buildings for which materials were furnished by a sub-contractor could not, through such notice, be rendered personally liable for the materials furnished for the other building separately owned by another person; and where a sub-contractor furnished for two buildings so separately owned materials which were used in said buildings, no distinction between the buildings being made in the furnishing of the materials or in the sub-contractor's claim therefor or his notice, no personal liability under said statute for such claim, or any part thereof, could be enforced by notice to and suit against one of such separate owners alone.

PRACTICE.—*Special Finding.—Motion for New Trial.*—In considering an exception to the conclusion of law in a special finding, the Supreme Court treats the statement of facts in the finding as containing all the material facts shown by the evidence. The failure of the court to state all such facts may be reached by motion for a new trial, assigning that the finding is not sustained by sufficient evidence.

From the Hancock Circuit Court.

A. L. Ogg, C. A. Ray, F. Knefler and J. S. Berryhill, for appellant.

E. Marsh and W. W. Cook, for appellees.

BLACK, C.—The appellant sued the appellees, Powell, Hart and Thayer. In each of the three paragraphs of the complaint it was shown, in substance, that Hart and Thayer, being the owners of two certain buildings or having some valuable interest therein, had employed Powell, a mechanic, to make certain repairs upon said buildings and to furnish

Crawford v. Powell et al.

the materials therefor; that the plaintiff furnished certain materials, of a value stated, to Powell, to be used, and which were used, by him in repairing said buildings; that the plaintiff gave notice in writing to Hart and Thayer, particularly setting forth the plaintiff's claim for said materials and the amount thereof, and that he would hold them responsible therefor. It was alleged that when this notice was given Hart and Thayer were indebted in a greater amount to Powell on account of said work, and that the plaintiff's claim remained due and unpaid.

The third paragraph of the complaint, in addition to averments in substance the same as those of the other paragraphs, alleged that while the indebtedness of Hart and Thayer to Powell still existed, Powell, having ordered Thayer to pay the plaintiff's claim, was notified by Thayer of his willingness to do so, and the plaintiff, having been notified by Thayer of said order and of his readiness to pay the claim, agreed to and ratified the arrangement.

The defendants Hart and Thayer answered in six paragraphs, the first being a general denial. The plaintiff's demurrer to all the paragraphs of this answer except the first was overruled; and the plaintiff having replied, the cause was tried by the court. A special finding was rendered, to the conclusions of law in which the plaintiff excepted. The plaintiff moved unsuccessfully for a new trial, and judgment was rendered against Powell and in favor of Hart and Thayer.

It is urged by way of objection to the action of the court in overruling the demurrer to the answer, that its special paragraphs did not state a defence to that part of the third paragraph of the complaint wherein it differed from the other paragraphs.

The fifth paragraph of the answer alleged that the indebtedness averred and charged in the complaint had been paid off and satisfied before the institution of this suit.

Without looking further, it is sufficient to say that the demurrer being joint, and there being at least one good para-

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graph of answer to the whole complaint, the demurrer was properly overruled.

In the special finding, the court found, in substance, that Powell repaired two houses, one a store-room, owned by Hart, and the other a dwelling-house, owned by Hart's wife; that Thayer, being authorized by said owners, contracted with Powell to do the work for a certain sum, for and on account of Hart and Thayer; that Powell purchased of the plaintiff the materials mentioned in the complaint, of a value stated; that Powell did the work as contracted, and in doing it used said materials; that after the work was done the plaintiff sent to Hart and Thayer a written notice, set out in finding. In this notice, addressed to Hart and Thayer, the plaintiff stated that Powell, "representing to me that he had entered into a contract with you to do certain ornamental work on certain houses of yours, on this representation I sold and furnished to said Powell," on, etc., certain materials to put in said work, particularly mentioning the articles, with their prices, of a total value stated. Hart and Thayer were requested to take notice that the plaintiff would hold them liable "for the amount, to the extent of your present indebtedness to said Powell."

It was found by the court that when this notice was served Hart and Thayer owed Powell on said work enough to pay the plaintiff's claim; that at the time when said materials were sold to Powell by the plaintiff, Powell informed the plaintiff that the former "was going to do said work, and was going to use the materials in said buildings, but there was no contract entered into between them that the goods were to be furnished for this particular work, or in any way restricting their use to these buildings. In the language of the plaintiff, he sold them to Powell, and did not know, or pretend to know, where he was going to use them."

The court stated, as a conclusion, that upon these facts the law was with the defendants Hart and Thayer, and that he

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public crossing by the locomotive of the appellee. There was no evidence that the board of commissioners had passed an order authorizing cattle to run at large. The appellee demurred to the evidence and the court sustained the demurrer.

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Judgment affirmed.

Filed April 22, 1885.

Crawford v. Powell *et al.*

No. 11,467.

CRAWFORD v. POWELL ET AL.

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SAME.—*Several Buildings Separately Owned.*—The owner of one of two buildings for which materials were furnished by a sub-contractor could not, through such notice, be rendered personally liable for the materials furnished for the other building separately owned by another person; and where a sub-contractor furnished for two buildings so separately owned materials which were used in said buildings, no distinction between the buildings being made in the furnishing of the materials or in the sub-contractor's claim therefor or his notice, no personal liability under said statute for such claim, or any part thereof, could be enforced by notice to and suit against one of such separate owners alone.

PRACTICE.—*Special Finding.*—*Motion for New Trial.*—In considering an exception to the conclusion of law in a special finding, the Supreme Court treats the statement of facts in the finding as containing all the material facts shown by the evidence. The failure of the court to state all such facts may be reached by motion for a new trial, assigning that the finding is not sustained by sufficient evidence.

From the Hancock Circuit Court.

A. L. Ogg, C. A. Ray, F. Knefler and J. S. Berryhill, for appellant.

E. Marsh and W. W. Cook, for appellees.

BLACK, C.—The appellant sued the appellees, Powell, Hart and Thayer. In each of the three paragraphs of the complaint it was shown, in substance, that Hart and Thayer, being the owners of two certain buildings or having some valuable interest therein, had employed Powell, a mechanic, to make certain repairs upon said buildings and to furnish

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the materials therefor; that the plaintiff furnished certain materials, of a value stated, to Powell, to be used, and which were used, by him in repairing said buildings; that the plaintiff gave notice in writing to Hart and Thayer, particularly setting forth the plaintiff's claim for said materials and the amount thereof, and that he would hold them responsible therefor. It was alleged that when this notice was given Hart and Thayer were indebted in a greater amount to Powell on account of said work, and that the plaintiff's claim remained due and unpaid.

The third paragraph of the complaint, in addition to averments in substance the same as those of the other paragraphs, alleged that while the indebtedness of Hart and Thayer to Powell still existed, Powell, having ordered Thayer to pay the plaintiff's claim, was notified by Thayer of his willingness to do so, and the plaintiff, having been notified by Thayer of said order and of his readiness to pay the claim, agreed to and ratified the arrangement.

The defendants Hart and Thayer answered in six paragraphs, the first being a general denial. The plaintiff's demurrer to all the paragraphs of this answer except the first was overruled; and the plaintiff having replied, the cause was tried by the court. A special finding was rendered, to the conclusions of law in which the plaintiff excepted. The plaintiff moved unsuccessfully for a new trial, and judgment was rendered against Powell and in favor of Hart and Thayer.

It is urged by way of objection to the action of the court in overruling the demurrer to the answer, that its special paragraphs did not state a defence to that part of the third paragraph of the complaint wherein it differed from the other paragraphs.

The fifth paragraph of the answer alleged that the indebtedness averred and charged in the complaint had been paid off and satisfied before the institution of this suit.

Without looking further, it is sufficient to say that the demurrer being joint, and there being at least one good para-

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graph of answer to the whole complaint, the demurrer was properly overruled.

In the special finding, the court found, in substance, that Powell repaired two houses, one a store-room, owned by Hart, and the other a dwelling-house, owned by Hart's wife; that Thayer, being authorized by said owners, contracted with Powell to do the work for a certain sum, for and on account of Hart and Thayer; that Powell purchased of the plaintiff the materials mentioned in the complaint, of a value stated; that Powell did the work as contracted, and in doing it used said materials; that after the work was done the plaintiff sent to Hart and Thayer a written notice, set out in finding. In this notice, addressed to Hart and Thayer, the plaintiff stated that Powell, "representing to me that he had entered into a contract with you to do certain ornamental work on certain houses of yours, on this representation I sold and furnished to said Powell," on, etc., certain materials to put in said work, particularly mentioning the articles, with their prices, of a total value stated. Hart and Thayer were requested to take notice that the plaintiff would hold them liable "for the amount, to the extent of your present indebtedness to said Powell."

It was found by the court that when this notice was served Hart and Thayer owed Powell on said work enough to pay the plaintiff's claim; that at the time when said materials were sold to Powell by the plaintiff, Powell informed the plaintiff that the former "was going to do said work, and was going to use the materials in said buildings, but there was no contract entered into between them that the goods were to be furnished for this particular work, or in any way restricting their use to these buildings. In the language of the plaintiff, he sold them to Powell, and did not know, or pretend to know, where he was going to use them."

The court stated, as a conclusion, that upon these facts the law was with the defendants Hart and Thayer, and that he

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found for them, and for the plaintiff against Powell, and assessed his damages at a sum stated.

The statute under which the appellant sought, by the giving of said notice, to fix a personal liability in his favor upon Hart and Thayer, provided (R. S. 1881, section 5295): "Any sub-contractor, journeyman, or laborer employed in the construction, repair, or furnishing materials for any building, may give to the owner thereof, or, if said owner be absent, to his agent in charge of said building or repairs, notice in writing, particularly setting forth the amount of his claim and services rendered for which his employer is indebted to him, and that he holds the owner responsible for the same. The owner shall be liable for such claim, but not to exceed the amount which may be due, and may thereafter become due, from him to the employer; which may be recovered in an action," etc. See, for existing statute, section 9, Acts 1883, p. 142.

The person against whom the personal liability for the claim might be obtained under the statute, and against whom the action provided for therein could be brought, was the owner of the building. The notice by which this liability was fixed must have been given to the owner, unless he were absent.

Thayer was not an owner of either of the buildings. The fact that he with Hart was liable to Powell did not render him subject to be made liable to a sub-contractor in a mode by which only the owner of the building can be made liable. Though Hart with Thayer was, under the contract, liable to Powell for work done upon Mrs. Hart's building and for the materials used in repairing it, a personal liability to the plaintiff under the statute could not be fixed upon Hart for materials furnished for the house of which he was not the owner. As it is necessary, in order that a sub-contractor may acquire a lien for materials furnished by him, that they should be furnished for and used in the particular building on which he attempts to acquire a lien, so, in order that a sub-contractor may fix a personal liability upon an owner, under the statute, for materials furnished, it is necessary that

they be furnished for and used in a building owned by the particular person to whom the notice is given.

At the time when the notice was given, Hart and Thayer owed Powell an amount equal to the claim of the plaintiff, but this indebtedness was under a contract for repairing both houses. No particular materials for which the plaintiff had a claim of definite amount were shown, either by the notice served or in the court's findings, to have been furnished for and used upon the building owned by Hart.

We need not decide whether or not when a sub-contractor furnishes materials generally for a number of buildings owned by one person, and such materials are used in the construction or repair of such buildings, the sub-contractor can acquire, under the statute, a personal claim upon such owner for the amount of all or of any part of such materials.

We hold that, under the statute, personal liability can not be fixed upon one not an owner, and that where materials are furnished by a sub-contractor for two buildings, separately owned by different persons, and such materials are used in the construction or repair of said buildings, no distinction between said buildings being made in the furnishing of the materials therefor or in the sub-contractor's claim or notice, no personal liability under the statute for such claim or any part thereof can be enforced against the owner of one of the buildings. *Hill v. Braden*, 54 Ind. 72, a case relating to liens on buildings for materials, is instructive in this connection.

It will be observed that, while in the special finding the court stated some evidence tending to prove that the goods were furnished for the buildings in which they were used, and some evidence of a contrary tendency, it stated that there was no contract between Powell and the plaintiff that the goods were to be furnished for this particular work, or in any way restricting their use to these buildings.

If the case were that of an attempt to fix a personal liability under the statute upon the owner of a single building

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for materials furnished for it and used in its repair, such a finding would preclude a conclusion of law in favor of the plaintiff; for the cause of action provided by the statute could be acquired only in the manner and under the circumstances indicated by the statute.

Complaint is made in argument against the special finding, because it contained no statement concerning the question whether Thayer had personally promised to pay the plaintiff's claim.

In considering an exception to the conclusion of law in a special finding, we must treat the statement of facts in the finding as a correct statement of all the material facts shown by the evidence. If material facts proved are not stated in the finding, this error could be reached by a motion for a new trial, assigning as cause that the finding was not sustained by sufficient evidence. The appellant did move for a new trial for such cause, and also for the reason that the finding was contrary to law. Upon an examination of the evidence, we find that the motion was properly overruled.

The judgment should be affirmed.

PER CURIAM.—Upon the foregoing opinion, the judgment is affirmed, at the costs of the appellant.

Filed Oct. 30, 1884; petition for a rehearing overruled April 25, 1885.

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No. 11,534.

ELSTON ET AL. v. CASTOR ET AL.

SHERIFF'S SALE.—*Statute of Frauds*.—Where it appears in a special finding that a sheriff, at the time of a sale of land by him, on execution, wrote and signed a certificate of sale to the purchaser, it will be presumed by the Supreme Court that such certificate conformed to the statute and was, therefore, sufficient to take the sale out of the statute of frauds.

SAME.—*Voidable Sale*.—Where a sheriff sells land on execution, and there is delay, not by agreement, in the payment of the purchase-money, which is afterward paid, and the certificate of sale is then delivered by

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the sheriff to the purchaser, the sale is valid as to persons who have not acquired intervening rights, though before such consummation voidable for want of compliance with the statute of frauds.

SAME.—Inadequacy of Price.—Collateral Proceeding.—Where land sold by a sheriff on execution was, at the time of the sale, subject to judgment liens, the owners of which were entitled to redeem from such sale, it was treated as not void because of inadequacy of price in a collateral suit brought by the holder of such a lien.

SAME.—Equal Liens.—Priority Through Diligence.—Where a person becomes the owner of land, and judgments theretofore existing against him thus at once become liens on the land, the liens are equal; but the one of the holders of such liens who first causes execution on his judgment to be issued and levied on such land, thereby obtains a lien superior to those of other judgments, the owners of which may, as junior judgment creditors, redeem from the sale under such execution.

SAME.—Bankruptcy.—A judgment lien may be enforced by a sale of the property upon which it is a lien, after the bankruptcy of the judgment debtor, if execution under such judgment was levied on such property before such bankruptcy.

SAME.—Assignee's Conveyance.—Merger.—Where a judgment debtor whose land had been sold on execution became a bankrupt during the year for redemption from such sale, his right to redeem passed to his assignee in bankruptcy; and where, without redeeming, the assignee sold and conveyed such land subject to liens thereon to the holder of the sheriff's certificate of sale, who bought of the sheriff and of the assignee, not in trust for the judgment debtor but to protect his own interest and without fraud, the title derived under the sheriff's sale was not merged in a title so acquired from said assignee, so as to prevent such purchaser from completing his title under the sheriff's sale, at the expiration of the year for redemption, by taking the sheriff's deed.

From the Hamilton Circuit Court.

F. M. Trissal, G. Shirts and W. R. Fertig, for appellants.

D. Moss, R. R. Stephenson, H. A. Lee and R. Graham, for appellees.

ZOLLARS, C. J.—This is an action by appellants to have the title claimed by appellee Samuel B. Castor to the lands described in the complaint declared void, certain judgments which were liens upon the lands declared satisfied, to have appellants' judgment declared a superior lien, and to have the lands ordered sold in satisfaction thereof. The facts as found by the court below are as follows:

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Prior to the 4th day of April, 1877, judgments had been rendered against appellee Wm. H. Castor, as follows: In favor of appellants for \$3,762.44; in favor of First National Bank of Lebanon for \$3,546.70; in favor of Marion W. Essinger, administrator of the estate of Nathaniel F. Dunn, deceased, for \$3,228.56; in favor of John V. Suman for \$1,769; in favor of Hazelrigg and other for \$1,222.25. By the death of his wife, Martha J., on the 4th day of April 1877, Wm. H. Castor became the owner of the lands described in the complaint, which were worth \$8,780. Subsequent to this, another judgment for \$6,233.29 was rendered against Wm. H. Castor, in favor of other parties, among them appellee Samuel B. Castor. This was a judgment over in a foreclosure proceeding. The mortgage was upon lands worth \$9,725, other than those described in the complaint. On the 31st day of January, 1878, an execution was issued upon the judgment in favor of Essinger, administrator, and levied upon the lands described in the complaint, which was the first and only execution levied after the death of the wife Martha J. The land not having been sold, a *vendi.* was issued, and, after due publication, the lands were sold on the 21st day of September, 1878, for \$1,125 to one George Bonebrake, he being the highest and best bidder.

At the time of this offer for sale and bidding off, the defendant Samuel B. Castor, brother of the defendant William H. Castor, was present, and it was then arranged and agreed between the sheriff, said Bonebrake, and said Samuel B. Castor, that said Samuel B. Castor was to pay the sum of eleven hundred and twenty-five dollars, bid as aforesaid, and get the certificate of purchase. No money was paid at the date of the sale, nor did Bonebrake ever pay the amount of his bid, but afterwards, to wit, on the 7th day of November, 1878, said Samuel B. Castor paid to said sheriff said sum of eleven hundred and twenty-five dollars, and the certificate of purchase that had been made out in the name of said Bonebrake on the 21st day of September, 1878, was, on said 7th day of

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November, 1878, assigned to said Samuel B. Castor by said Bonebrake by written endorsement thereon. The money with which the bid at the sheriff's sale was paid and that procured the sheriff's certificate was furnished by said Samuel B. Castor. At the time of the sheriff's sale there was no written memorandum, contract, or agreement showing the terms of the sale, made out and signed by the sheriff.

"8. On the 27th day of August, 1878, said William H. Castor filed his voluntary petition in the district court of the United States for the district of Indiana, asking to be adjudged a bankrupt, and on the 29th day of August, 1878, was adjudged a bankrupt, and one Robert C. Losey was appointed his assignee, to whom the register in bankruptcy for said district transferred by deed of assignment all of the property of said bankrupt.

"9. On the 7th day of January, 1879, said defendant Samuel B. Castor proposed to said assignee in bankruptcy that he would purchase all of said bankrupt's real estate in said county of Hamilton, subject to all encumbrances thereon, and would give therefor the sum of seventy-five dollars. And said assignee, on that day, by a petition to said district court, in which he recited said offer, procured an order directing the sale of all of said bankrupt's real estate to said Samuel B. Castor, subject to all encumbrances thereon, for said sum of seventy-five dollars, and in pursuance of said order said sale was made and confirmed, and all of said bankrupt's real estate, in pursuance of the terms of said sale, was, on said 7th day of January, 1879, conveyed to said Samuel B. Castor.

"10. In the schedules annexed to his petition to be adjudged a bankrupt, said William H. Castor set forth all the judgments and liens hereinbefore mentioned as the liens existing against his real estate; also, therein stated that there then existed, in addition to the liens aforesaid (hereinbefore described), judgments rendered in the Hamilton Circuit Court against him as follows: One judgment in favor of the First National Bank of Crawfordsville, for the sum of \$3,689.25,

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and one in favor of the same bank for the sum of \$1,532.25; also one in favor of the Second National Bank of Lafayette, Indiana, for the sum of \$3,503.53; but in fact no such judgments had been rendered in said Hamilton Circuit Court, nor had any transcripts of any such judgments from any other court been filed in the office of the clerk of said Hamilton Circuit Court. And in his said schedules and petition, said bankrupt omitted any statement, showing that his real estate had been levied upon by virtue of the executions upon said Essington judgment. At the time of the adjudication of said William H. Castor as a bankrupt, the plaintiffs in this suit were not residents of Hamilton county, Indiana.

"11. The judgments in favor of the First National Bank of Lebanon have been paid in full, but were not paid by either said William H. Castor or said Samuel B. Castor, nor collected from the property of either.

"12. After the purchase from said assignee, to wit: On the 21st day of September, 1879, said Samuel B. Castor paid the sum of five hundred dollars to the holder of said judgment in favor of John V. Suman, and in consideration of such payment received an assignment of said judgment.

* * * * *

"16. Samuel B. Castor never at any time took or claimed the possession, use, or rents of any of the real estate purchased at said sheriff's and said assignee's sale, nor has he exercised any acts of ownership over the same, but said William H. Castor has continuously since said sheriff's sale had exclusive possession and use of all of said real estate, and received all the rents and products thereof, rendering no account thereof to said Samuel B. Castor, and he, said William H. Castor, has also expended \$2,000 in making improvements upon the lands described in the complaint; that no verbal or written contract or agreement between said Samuel B. Castor and William H. Castor, made at any time since said sheriff's sale, by which said William H. was to have the possession, use and rents of said real estate, has been entered

into, except he said to William instead of going west he could continue in charge of the farm and try to regain his fortune; but the possession and receipt of the rents by said William H. Castor have been with the knowledge and consent of said Samuel B. Castor; nor has said William H. Castor purchased said real estate or any part thereof from said Samuel B. Castor since said sheriff's sale.

"17. Said William H. Castor received his discharge in bankruptcy on the 18th day of March, 1879, and on the 8th day of October, 1879, said Samuel B. Castor, without receiving anything of value whatever for so doing, conveyed one of the forty-acre tracts of land described in the complaint, to wit, the east half of the west half of the northeast quarter of section twenty-three (23), township 19, range five (5), to said William H. Castor, who now holds the title so conveyed to him.

"18. At the date of the sheriff's sale and continuously since then, said William H. Castor had not sufficient property subject to execution, excluding that described in the complaint, to pay his debts.

"19. Said defendant Samuel B. Castor purchased said Suman judgment for the purpose of preventing the holder thereof from redeeming from said sheriff's sale, and made the purchase from the assignee in bankruptcy to prevent other persons from becoming the owners of the real estate.

"20. On the 23d day of September, 1879, said Samuel B. Castor procured a sheriff's deed for the lands described in the complaint to be made to him by the successor of the sheriff who had issued the sheriff's certificate, said deed purporting to be made in pursuance of the terms of said certificate.

"21. At the time of going into bankruptcy, the debts owing by said William H. Castor, other than those secured by the mortgage of August 26th, 1876, and those represented by the judgments hereinbefore found to have existed as judgment liens, amounted to less than five hundred dollars, and he had no property of any value except the real estate de-

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scribed in the complaint and in the mortgage of August 26th, 1876. And in the schedule annexed to his petition to be adjudged a bankrupt, he exaggerated the amount of liens existing against his real estate to the extent of eight thousand seven hundred and twenty-five dollars. He also failed to state or show anything about his having executed the mortgage of August 26th, 1876, or that it existed as a lien upon his lands, but in his said schedules he included and mentioned the debts secured by said mortgage as judgment liens."

Upon these facts so found the court below rendered judgment in favor of appellees. Appellants ask a reversal of the judgment upon the following grounds:

"*First.* There was no valid sheriff's sale.

"*Second.* The purchaser at the sheriff's sale, if it was a valid sale, acquired no interest in the lands that was not subject to the other judgments, and the sale did not destroy or impair the equality of the liens.

"*Third.* Any lien or estate acquired by virtue of the sheriff's sale was merged in the title acquired by the subsequent purchase from the assignee in bankruptcy.

"*Fourth.* No equitable reason for preventing the merger and keeping the encumbrance alive after the purchase from the assignee in bankruptcy exists.

"*Fifth.* The contract of purchase from the assignee stipulating that he took the land subject to all encumbrances bound the land in Samuel B. Castor's hands for the payment of the encumbrances.

"*Sixth.* Samuel B. Castor was not an actual *bona fide* purchaser of the sheriff's title for himself, but procured it to be held in trust for his brother William H. Castor, and procured it to assist the latter in carrying out his intention to hinder, delay and defraud his creditors."

As to the sheriff's sale, the argument is that the special findings show that there was no memorandum made at the time; that the money was not paid at the time; that the sale was for an inadequate amount, and that for these reasons the sale was absolutely void. The findings show, however, that at

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the time of the sale the sheriff wrote out and signed a certificate of sale to the purchaser, Bonebrake. It should be presumed that this certificate contains all that the statute requires. 2 R. S. 1876, p. 220; R. S. 1881, section 766. Such a certificate, it has been held, is sufficient to take the sale out of the statute of frauds. Rorer Jud. Sales, section 744; *Armstrong v. Vroman*, 11 Minn. 220; Freeman Executions, section 299, and cases cited. But if it was not, the sale here, under the facts found, was not void, but voidable only; and while the purchaser could not have enforced a compliance on the part of the sheriff, and he on the other hand could not have enforced the payment of the amount bid, yet there was a moral obligation on the part of both to comply with the terms of the sale; and when the parties, recognizing this moral obligation, completed the sale by the payment of the money and the delivery of the certificate, and no new rights of third parties having intervened, the sale became a valid sale, so far as it might have been affected by the statute of frauds. *Hadden v. Johnson*, 7 Ind. 394; *Fowler v. Burget*, 16 Ind. 341; *Wills v. Ross*, 77 Ind. 1 (40 Am. R. 279); *Cool v. Peters Box, etc., Co.*, 87 Ind. 531; *Owens v. Lewis*, 46 Ind. 488, 518 (15 Am. R. 295).

This is not a case of the sheriff selling on credit; nor was the certificate delivered before the money was paid. Nor is it a case where either the sheriff or purchaser is seeking to enforce the sale. The sale, as we have seen, was consummated. There was a delay in the payment of the purchase-money, but it does not appear to have been by agreement on the part of any one.

We can not hold that there was such an inadequacy in the amount for which the lands were sold as would justify a holding that the sale is void. In a direct proceeding for that purpose, inadequacy of price, with other circumstances, may be such as to justify a court in setting aside a sheriff's sale of land. But even in such a proceeding the rulings seem

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to be that inadequacy of price alone will not warrant the setting aside of a sale. Freeman Executions, section 309; *Dawson v. Jackson*, 62 Ind. 171; *Sowle v. Champion*, 16 Ind. 165; *Bertenshaw v. Moffitt*, 6 Ind. 464; *Benton v. Shreve*, 4 Ind. 66; *Roe v. Ross*, 2 Ind. 99; Herman Executions 411, section 252.

This doctrine is the more reasonable in States which, like this, have laws allowing redemption from sheriff's sales. Where a party may redeem from such sales, he is not in a very favorable condition to complain that the amount necessary to a redemption is small. It should be remembered here, too, that this is not a direct proceeding to set aside the sale. The case is prosecuted upon the theory that the sale is absolutely void, and may be so treated in a collateral proceeding. The rule to be applied in such cases is not the same. As said in the case of *Davis v. Campbell*, 12 Ind. 192, a sale will be set aside as erroneous in a direct proceeding for that purpose, when it would not be held void in a collateral suit. See, also, *Jones v. Kokomo Building Ass'n*, 77 Ind. 340, 344. It should be remembered too, that while the lands sold for \$1,125 were worth \$8,780 they were subject to judgments of equal date with appellants', in the sum of about \$13,000, and the judgment over in the foreclosure proceedings of \$6,233.29. It is true that the land covered by the mortgage was worth \$9,725, but that did not prevent the judgment over being a lien upon the lands in controversy here. In the event of the mortgaged land not selling for enough to satisfy the decree, the owner of that judgment would have had the right to look to the lands described in the complaint for the balance, subject, of course, to the older judgments.

After the sale, the judgment in favor of the Lebanon bank was satisfied by some one; the Essinger judgment was in a way satisfied, and the Suman judgment purchased by Samuel B. Castor, but they were all liens at the time of the sale, and we know of no reason why the Suman judgment did not continue to be a lien. But if the bank and Essinger judgments

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were deducted, the liens aside from the judgment over would still be over \$7,000, almost as much as the value of the lands sold. Any of these judgment plaintiffs, as we shall see hereafter, might have redeemed from the sale on the Essinger judgment. When all these facts are considered, it can not be said that the amount for which the lands were sold was so inadequate as to render the sale void. *Kerr v. Haverstick*, 94 Ind. 178.

There was no secrecy about the sale, nor was there any combination by which the selling price was kept down. For aught that appears, appellants and others might have attended the sale and competed as bidders. Why Bonebrake bid off the lands, and agreed that Samuel B. Castor should pay the amount and become the assignee of the certificate, is not shown; but this is hardly a circumstance to throw suspicion upon the sale. Samuel B. Castor was a judgment creditor, and had a right to protect his judgment, and he had the right that any other person might have exercised to buy the lands with the hope of profit. And after the purchase he had a right to protect the sale against redemption by purchasing the judgments of others, who threatened or contemplated a redemption. He also had the undoubted right to purchase the judgments at the lowest figures that the parties might agree upon. That he purchased them for less than their face was a matter between him and those from whom he purchased; it is surely not a matter about which appellants may complain. They might have done the same thing. He seems to have paid his own money. So far as shown, Wm. H. Castor did not furnish a dollar.

There are other circumstances that appellants claim are connected with the sale, which we shall notice further along.

At the time the judgments were taken, except that in the foreclosure proceedings, Wm. H. Castor was not the owner of the lands described in the complaint. When he became the owner of them by the death of his wife, the judgment liens all attached at the same instant, and became equal liens.

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This is conceded, and is well settled by authority. The execution upon the Essington judgment was the first and only execution issued and levied, and upon that the lands were sold. The contention of appellants is, that conceding the sale to have been valid, yet it did not destroy the equality of the liens of the several judgments; that hence the purchaser took the lands subject to those liens, and that, therefore, the lands may be re-sold upon those judgments without redemption from the sale and without regard to it. In the maintenance of this contention, they have found it necessary to assail the case of *Michaels v. Boyd*, 1 Ind. 259. In that case, as in this, the judgment defendant owned no real estate at the time the judgments were rendered. It was held that the several judgments attached and became liens at the same instant upon the after-acquired real estate, and hence liens in all things equal. One of the judgment plaintiffs had an execution issued upon his judgment, upon which the real estate was sold. The contest was between him and other judgment plaintiffs, as to who was entitled to the fund in the hands of the sheriff. It was decided that he whose execution was first issued and levied was entitled to it. In support of the holding, the cases of *Adams v. Dyer*, 8 Johns. 347, *Waterman v. Haskin*, 11 Johns. 228, and *Burney v. Boyett*, 1 How. (Miss.) 39, were cited.

The decision, in effect, is a holding that the prior levy gave priority to the judgment upon which it was issued. In stating the question, preliminary to a decision in the affirmative, Judge BLACKFORD said: "The first question presented is, was the judgment of the plaintiffs entitled to priority as to the date of the lien?" This decision has never been questioned by this court, but on the contrary approved and followed. In the case of *Lowry v. Reed*, 89 Ind. 442, a question was made as to the superiority of title. A party had become replevin bail on two judgments on the same day. As to his real estate, the liens of the two judgments were thus equal. One of the judgment creditors had an execution issued upon his judgment, upon which the land of the replevin

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bail was sold. Afterwards, another judgment creditor had an execution issued upon his judgment, and the land was again sold. The court, after citing with approbation the case of *Michaels v. Boyd, supra*, said: "In the case at bar the judgments against the replevin bail became liens on his property on the same day; neither had any priority over the other. * * * The appellee, by his superior diligence in issuing and levying his execution, secured the preference." Although not in explicit terms reasserted, the same doctrine was recognized in the case of *State, ex rel., v. Cisney*, 95 Ind. 265.

We are cited to the case of *Rockhill v. Hanna*, 4 McLean, 554, in which the U. S. Circuit Court for the district of Indiana declined to follow the case of *Michaels v. Boyd, supra*, and the cases therein cited. Of that case it is sufficient to say that it went to the Supreme Court of the United States upon a certificate of division in opinion between the judges below and was there reversed. In the opinion, the case of *Michaels v. Boyd, supra*, and the cases therein cited, were cited and approved, and their doctrine reasserted. *Rockhill v. Hanna*, 15 How. (U. S.) 189.

The same doctrine has been held in many other cases. In the case of *Smith v. Lind*, 29 Ill. 24, the court said: "While the lien was made equal, diligence was left to its reward. Under the general law, the lien of judgments is equal, but the vigilant creditor can acquire a preference in the payment of his judgment, although it has but an equal lien, by first issuing his execution. If one creditor, who is precisely equal to another in point of lien, shall get an advantage by the use of superior diligence in discovering property, making a levy and sale of it, where is the hardship or injustice? If the property is sold below its value, the right of redemption and resale remains to the other judgment creditors." This case also cites and approves the case of *Michaels v. Boyd, supra*.

The same doctrine is held in Mississippi. *Burney v. Boyett, supra*. And so in Missouri. In the case of *Bruce v. Vogel*, 38 Mo. 100, it was said: "If one creditor who is exactly

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equal to another as regards liens, by energy, perseverance and diligence, discovers property whereon to levy and make his money, justice demands that he shall reap the fruits of his industry. * * * We are well satisfied, on principle, that where judgment liens are equal, one judgment creditor can get priority over another by his superior vigilance and watchfulness."

The Alabama court is in accord with the above cases. *Bliss v. Watkins*, 16 Ala. 229. And so is the Iowa court. *Cook v. Dillon*, 9 Iowa, 407.

In the case of *Lippencott v. Wilson*, 40 Iowa, 425, the facts were as follows: Two parties recovered judgments against a third party on the same day. One of the judgment creditors, Ellison, had an execution issued upon his judgment, and levied upon the land of the judgment defendant. The land was sold upon the execution and purchased by the judgment creditor upon whose judgment the execution was issued. The other judgment creditor brought an action to have the land subjected to the payment of his judgment. The court said: "It has also been held that, 'as between judgment creditors whose liens are of the same date, he who first takes the property in execution has the preference to be first paid out of its proceeds.' * * * It is not possible to accept these propositions, and to accede to them their logical consequences, and at the same time to deny to the Ellisons the prior and better right to the property in controversy, under the facts stipulated and admitted in argument." This case, it will be observed, decides the exact question involved here, and against appellants' contention.

Mr. Freeman, in his work on Judgments, at section 374, says: "If two or more judgments, on account of their contemporaneous rendition or docketing, or from any other cause, are equally entitled to precedence as liens on the real estate of the judgment debtor, this equality may be destroyed, in order to give precedence to the lien-holder who first attempts to subject any specific real estate to the payment of his

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lien. 'The law favors diligent creditors;' and the courts seem to be unanimous, where liens are otherwise equal, in according to him who first takes property in execution, the right to be first satisfied out of its proceeds." See, also, *Freeman Executions*, section 203.

Rorer in his work on *Judicial Sales*, section 703, says: "If several judgment creditors have judgments of equal date, and their judgments are in law all liens on the real estate of the same defendant, the one that levies thereon first obtains priority."

The result of all these authorities, and the direct holding of some of them, is that where there are different judgments, which are equally liens upon the lands of the judgment debtor, the judgment creditor who first has issued and levied an execution thereby obtains a lien which is superior to that of the other judgments upon which executions have been subsequently issued, or upon which no executions have been issued. The result of this is that the first execution so far subordinates the lien of the other judgments, that the owners of them may redeem from the sale upon the first execution, under the statute which provides that junior judgment creditors may redeem.

It would be illogical to hold that by such an execution the judgment creditor acquires a priority, to be paid out of the proceeds of the sale, but that the purchaser who pays the money gets nothing that he can hold as against the other judgments. In this case, the liens at the time of the sale far exceeded the value of the lands. According to the theory of appellants, a purchaser at a sheriff's sale could not get a valid title unless he should bid and pay enough to discharge all of the liens; for if he should bid and pay less, each of the other judgment creditors might disregard the sale, treat it as void, and re-sell the land; and thus the re-sales might continue until each judgment creditor should be paid full, each time the purchaser losing what he paid, unless, perhaps, executions should be issued upon all of the judgments at the same time.

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But if any one judgment creditor should refuse to have an execution issued upon his judgment, then the same difficulty would arise, and the land could not be sold so as to carry a valid and sure title.

Judgments are liens upon the real estate of the judgment debtor because the statute makes them such. This lien is given for the purpose of collection. Mr. Freeman says, "A judgment is not a specific lien on any particular real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens." "In short, a judgment creditor has no *jus in re*, but a mere power to make his general lien effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land." Section 338. And so it was said in the case of *Gimbel v. Stolle*, 59 Ind. 446, 451, distinguishing a mortgage and judgment lien: "There can be no doubt that a law, which gives a judgment creditor a lien on the real estate of the debtor, relates solely to the remedy."

When the liens are thus equal, and one of the judgment creditors first pursues the remedy and exercises the power of making his lien effectual by following up the steps of the law by an execution and levy, he thereby makes his consummated lien superior, which until then was but equal.

This does not conflict with the rulings that a judgment lien which is superior by seniority can not be overthrown by a junior judgment lien. There the preference is completed by the seniority. Here there is no seniority, and the preference is brought about by the superior diligence in following up the steps of the law, and, in a sense, appropriating the property by the levy of an execution.

Upon the theory that the levy of an execution fixes and strengthens the judgment lien rests the decision of this and other courts holding that a judgment lien may be enforced by a sale of the property upon which it is a lien, after the bank-

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ruptcy of the judgment debtor, if the execution has been levied before such bankruptcy; and that a judgment lien, without an execution and such levy, may not be thus enforced after the bankruptcy of the judgment debtor. *O'Harra v. Stone*, 48 Ind. 417; *Blair v. Hanna*, 87 Ind. 298.

In the case before us, the execution upon which the sale was made had been levied before the bankruptcy of Wm. H. Castor; therefore his bankruptcy did not affect the sale, nor in any way affect the title through that sale. Before the expiration of the year for redemption had expired, the assignee in bankruptcy, upon the suggestion of appellee Samuel B. Castor, procured an order from the bankrupt court for the sale of the bankrupt's real estate, subject to the liens thereon. The sale was thus made to Samuel B. Castor for seventy-five dollars. At the expiration of the year for redemption, said Castor procured a sheriff's deed for the real estate. It is said in argument that the sheriff's deed conveyed nothing, because at that time all the title and rights that the owner, Wm. H. Castor, had in the real estate, had passed from him by the bankruptcy proceedings. A sufficient answer to this is that the title carried by a sheriff's deed is not the title that the judgment debtor may have at the time the sheriff's deed is made, but the title he had when the judgment became a lien, and at the time of the sale. *Doe v. Horn*, 1 Ind. 363; *Smith v. Allen*, 1 Blackf. 22; *Gale v. Parks*, 58 Ind. 117; *Wilhelm v. Humphries*, 97 Ind. 520; *Elliott v. Cale*, 80 Ind. 285; *Riley v. Davis*, 83 Ind. 1.

Suppose, that instead of going into bankruptcy, Wm. H. Castor had himself sold his interest in the lands, after they had been sold by the sheriff, could it be said that because he had no title or interest in the lands when the sheriff's deed was made, that deed conveyed no title? Clearly not. It can make no difference whether he made such a sale, or was divested of title to and interest in the lands by the bankruptcy proceedings. It is contended by appellants, and conceded by appellees, that as the lands were sold by the assignee subject

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to the liens thereon, appellants' judgment lien was not destroyed by the bankruptcy proceedings. It is not contended that the purchase from the assignee bound Samuel B. Castor, the purchaser, to pay off the liens, but only that the sale did not divest those liens; that he took and held the lands subject to the judgment liens, and that, therefore, they may be enforced against the lands notwithstanding the sheriff's sale and deed. And to make good their theory in this regard appellants argue that the sheriff's certificate held by Samuel B. Castor did not convey a legal title, but only a lien or equitable title, and that as he acquired title from the assignee before getting a sheriff's deed, that title was the superior title, and merged and swallowed up whatever title or interest was carried by the certificate. It is settled that the sheriff's certificate does not convey a legal title to the purchaser. *Hasselman v. Lowe*, 70 Ind. 414.

By the bankruptcy all of the right and title of the bankrupt passed to his assignee, and this was the right to redeem from the sheriff's sale. The assignee took the lands subject to the rights of Samuel B. Castor, the purchaser at the sheriff's sale. He might have redeemed from that sale and made the lands assets for the payment of the bankrupt's debts, or he might have sold the lands subject to the sale and the liens upon them. The latter he did. Had he sold to any person other than Samuel B. Castor, the purchaser would have become the owner of the equity of redemption, and might have redeemed from the sheriff's sale. It can not be said, we think, that, by the purchase from the assignee, Castor redeemed the land from the sheriff's sale. Does it follow, then, that because he was the purchaser at the sheriff's sale and the purchaser from the assignee, the title derived from the assignee swallowed up and destroyed all of his rights under the sheriff's sale, so that he could not at the end of the year for redemption take a sheriff's deed, and complete his title through the sheriff's sale?

It is a general rule at law that when two titles meet in the

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same person, the greater will merge and destroy the lesser, but this is not the general rule in equity.

In the case of *Howe v. Woodruff*, 12 Ind. 214, it was said: "But, notwithstanding this technical rule of law, it is well settled that a court of equity will keep an encumbrance alive, or consider it extinguished, as will best subserve the purposes of justice and the actual and just intention of the party." See, also, *Haggerty v. Byrne*, 75 Ind. 499; *Smith v. Ostermeyer*, 68 Ind. 432; *Gatling v. Dunn*, 52 Ind. 498.

Mr. Pomeroy, in his work on Equity Jurisprudence, at section 788, says: "If the intention has not been thus expressed, it will be sought for and ascertained in all the circumstances of the transaction. If it appears from all these circumstances to be for the benefit of the party acquiring both interests, that a merger shall not take place, but that the equitable or lesser estate shall be kept alive, then his intention that such a result should follow will be presumed, and equity will carry it into execution by preventing a merger. * * * If from all the circumstances a merger would be disadvantageous to the party, then his intention that it should not result will be presumed."

And again, at section 791: "If there is no reason for keeping it" (the lien) "alive, then equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it." See, also, section 793.

There can be no doubt, we think, as to the intention of Samuel B. Castor in purchasing the land at the sheriff's sale. He had a lien upon it by the judgment over in the foreclosure proceedings. He had a right to protect that lien by a purchase of the land. He also, as we have said, had a right to purchase the land as an investment. After he purchased it, it was to his interest to protect the purchase. It is said in some of the special findings, that after the purchase at the sheriff's sale, he purchased one of the other judgments to prevent a redemption. This he undoubtedly had a right to do,

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and it shows that his intention was to protect his interest acquired through the sheriff's sale.

It is found further that he made the purchase from the assignee in bankruptcy to prevent other persons from becoming the owners of the real estate. This, if it shows anything, shows that he was still seeking to protect his interest in the land by the sheriff's sale ; and the fact that when the year of redemption expired he procured a sheriff's deed, shows that he intended to preserve the sheriff's sale, and acquire title through it. It is evident that he did not rely for the better title upon the purchase from the assignee. To have relied upon that, and abandon the purchase from the sheriff, would have been to abandon all idea of making the judgment over in the foreclosure proceeding more secure, and to have lost all that he paid to the sheriff, because, having purchased from the assignee subject to all liens, in the absence of title through the sheriff's sale, he would have been compelled to pay the liens or lose the land and all that he had paid out.

Upon all these considerations, we think that it is but applying the reasonable rules of equity to hold that the purchase from the assignee did not destroy the rights acquired by the sheriff's sale, and that Castor, the purchaser at that sale, had a right to a sheriff's deed, and that the deed conveyed a title antedating the title acquired from the assignee. This is so, unless there is some reason not yet noticed why it should not be so.

It is said by Mr. Pomeroy, at section 794 of his work, *supra*, that equity will not prevent a merger when it will aid in carrying a fraud or other unconscientious wrong into effect, and that equity only interposes to prevent a merger, in order thereby to work substantial justice.

Appellants seek an application of this doctrine to this case, and insist that the special findings show that Samuel B. Castor was in collusion with his bankrupt brother to defraud the other creditors, and they cite the manner of the sheriff's sale, the purchase of one of the other judgments, the fact that the

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bankrupt brother has been allowed to remain upon the lands, receiving the rents and making improvements, the fact that Samuel B. has conveyed to him one forty-acre tract of the land, and the fact that in his schedules in bankruptcy Wm. H. Castor exaggerated the amount of the liens upon his real estate. The court below found these facts, but failed to find the ultimate fact, that in all this there was any collusion between the brothers, or that there was any fraud, or intent to defraud any one. If appellants were satisfied that the several facts mentioned were badges of fraud, and that fraud in fact should have been found, their proper course was by motion for a new trial. Fraud in such cases is a question of fact, and hence we can not determine it here as a matter of law from the facts here found. *Louthain v. Miller*, 85 Ind. 161. Nor is there anything found from which we can say as a matter of law, that the lands are held in trust for Wm. H. Castor. There is no evidence of any agreement of that kind. Wm. H. Castor is not shown to have furnished any money in the purchase of the lands. The only circumstance in the case looking that way is the fact that Samuel B. Castor has conveyed to his bankrupt brother forty acres of land, the value of which is not shown, and has left him upon the lands to repair his fortune, instead of going West. Samuel B., as matters have turned out, has undoubtedly realized handsomely upon his investment, and appellants have realized nothing, but that has been entirely their own fault, in failing to look after their interests at a proper time and in a proper manner. They might have attended the sheriff's sale and been competing bidders; they might have redeemed from that sale; they might have been competing bidders at the assignee's sale, and through the assignee they might have brought to the knowledge of the bankrupt court the fact that in the bankrupt's schedule he exaggerated the amount of the liens upon his land, and thus have prevented the assignee's sale, or had it set aside after it was made. All of this they neglected to do. Whatever of fraud or unfair dealing there may have

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been in the bankruptcy proceeding was a matter to have been dealt with by the assignee in bankruptcy and the bankrupt court. *Blair v. Hanna*, 87 Ind. 298.

It is too late now to attack and overthrow the title of Samuel B. Castor in the manner here attempted. The judgment must, therefore, be affirmed, with costs.

Filed April 2, 1885; petition for a rehearing withdrawn May 12, 1885.

No. 12,017.

COOK ET AL. *v.* THE STATE, FOR USE OF WHITTEN, COM-
MISSIONER OF DRAINAGE.

DRAINAGE.—*Lien of Assessments Under Act of March 8th, 1883.*—Under the drainage act of March 8th, 1883, the lien of assessments attaches upon the approval by the court of the assessments made by commissioners of drainage, and such lien relates back to the filing of the petition.

SAME.—*Priority of Mortgage Lien*—But where, before the approval by the court of such assessments, the lien of a mortgage, executed to a person who was not a party to, and had no notice of, the drainage proceeding, has attached to property assessed as benefited, it will have priority over the assessment lien.

From the St. Joseph Circuit Court.

J. Bradley and J. H. Bradley, for appellants.

FRANKLIN, C.—Appellants, other than Bradley, on the 5th day of December, 1882, commenced drainage proceedings in the St. Joseph Circuit Court.

The petition was heard; commissioners appointed, to whom the matter was referred; they reported an assessment of benefits and damages, which was approved by the court and the ditch ordered to be constructed. The construction commissioner gave the required notice, and made an assessment by instalments to pay for the work. No dates are given of any of the proceedings subsequent to the filing of the petition, except as hereinafter named, and no part of the record is

101	440
130	584
101	446
131	286
133	601
101	446
138	563

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made a part of the complaint by exhibit or otherwise. The complaint alleges that the appellant Bradley held a mortgage upon the lands against which the benefits had been assessed, which was a junior lien upon the lands to said assessment, and asked judgment for the assessments by instalments, and that it be declared a prior lien to said Bradley's mortgage.

Bradley answered, setting up her mortgage as a prior lien to said assessments.

The other defendants were defaulted, and a demurrer was sustained to Bradley's answer. The court rendered judgment on the demurrer for the assessments, and decreed it a prior lien upon the land to said mortgage. Bradley appealed to this court, and has assigned for error the sustaining of the demurrer to her answer.

The answer alleges that the mortgage to Bradley was executed on the 5th day of January, 1883, and that the lien for the assessments did not attach until the 27th day of June, 1883, subsequent to the execution and recording of the mortgage, and that the same was junior and subject to the lien of the mortgage.

Appellant, in her brief, expressly waives all objections to the complaint, and insists that the lien of the mortgage is prior in point of time, and paramount to the lien claimed by appellee.

The 4278th section, R. S. 1881, provides that "The amount of assessments so made by such commissioner" (that is, the commissioner having charge of the work) "shall be a lien upon the lands so assessed, from the date of recording notice of the establishing of the work by the court. * * * Such recording shall be notice to all the world of such lien from the date thereof." Which notice the complaint alleges was recorded on the 27th day of June, 1883, which is also stated in the answer.

This lien for assessments is purely statutory; it exists and must be controlled alone by the statute, and if the foregoing contained all the statutory provisions on the subject, there

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would be no difficulty in the question. But three days after the execution of the mortgage the act of March 8th, 1883, went into force, which provides, among other things, in the 5th section thereof, that "the amount of the assessment, as made or approved and confirmed by the court, shall be a lien upon the lands so assessed, from the time of filing the petition." Acts 1883, p. 179.

The assessment creating the lien under the act of 1881 is the assessment made by the commissioner having charge of the work, and the assessment creating the lien under the act of 1883 is that made by the drainage commissioners as approved by the court. *Moss v. State, ex rel., ante*, p. 321.

In the case under consideration, the mortgage was executed before the lien of the assessment was created under either of the above named statutes. But while under the statute of 1881 it attached upon the recording of the notice of the assessment, under the statute of 1883 it attached upon the approval of the assessment of the commissioners, and related back to the filing of the petition, which was notice to all parties named therein.

The date of the approval by the court of assessments by the commissioners is not stated either in the complaint or answer. We, therefore, can not infer that it was before the execution of the mortgage; and the question arises can a lien created after another lien has already attached be made, by relation back, to supersede the lien that had already attached? We think this question must be answered in the negative.

When appellant contracted for and accepted his mortgage, no such lien was upon the land, and he had a right to rely upon his mortgage being superior to any other lien that might be subsequently created. He was not a party to the drainage proceedings, was not named in the petition or any other part of the proceedings, had no notice whatever of such proceedings prior to the receipt of his said mortgage, and was not bound thereby.

We think the lien of appellant's mortgage is prior and su-

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perior to the lien of the drain assessments, and that the court erred in sustaining the demurrer to appellant's answer.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is reversed, at appellees' costs, and the cause is remanded, with instructions to overrule the demurrer to the answer, and for further proceedings.

Filed April 25, 1885.

No. 11,852.

SMITH v. LANE.

CONTRACT.—*Principal and Agent.*—*Commissions.*—The appellant and the appellee entered into a written contract on the 7th day of July, 1880, wherein the former agreed to pay the latter three per cent. commission for selling real estate; subsequently a verbal contract was made, wherein it was agreed that the appellee should enter the service of the appellant at a compensation of one dollar and twenty-five cents per day, but there was evidence showing that the written contract was not modified or abrogated; and that the compensation stipulated in the verbal contract was for managing appellant's general business.

Held, that the verbal contract did not necessarily supersede the original written agreement, and prevent the agent from recovering commissions for services performed under it.

From the Lake Circuit Court.

G. Burson and *R. L. Mattingly*, for appellant.

J. C. Nye, for appellee.

ELLIOTT, J.—The parties entered into a written agreement on the 7th day of July, 1880, wherein the appellant agreed to pay the appellee a commission of three per cent. for selling real estate of which she was the owner; subsequently a verbal contract was entered into between them, wherein it was agreed that the appellee should enter the service of the appellant at a compensation of one dollar and twenty-five cents per day. The witness who testified as to the verbal agreement also tes-

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tified that the written contract was exhibited to him at the time the verbal agreement was stated to him by the parties, and the same witness also testified that the appellee did superintend and manage the appellant's business. Another witness testified that the appellee did transact business for Mrs. Smith, lending money, superintending the erection of buildings, the construction of ditches, and the like. Several other witnesses testified that he had conducted business with them for her, and during the course of her testimony she admitted that he did conduct such business for her. None of the witnesses, directly or indirectly, state that the written contract was ever modified or abrogated; on the contrary, the only reasonable inference from the evidence is that it was always regarded by the parties as in full force. We do not think it can be said as matter of law that the verbal contract superseded the written. Our conclusion is that the commission was intended as a compensation for specific services in selling real estate; while the agreement to pay the stipulated sum per day was intended as a compensation for services rendered in conducting and managing appellant's general business. The fact that Mr. Lane undertook to manage her general business did not deprive him of a right to the commissions earned under his written contract, for the services therein provided for were not embraced in the verbal agreement.

There is evidence supporting the verdict upon all material points, as well as to the right to recover, as to the amount of the recovery, and settled rules forbid us to disturb it.

Judgment affirmed.

Filed April 22, 1885.

101	450
134	844
101	450
186	186

No. 11,995.

CARTER v. CARTER ET AL.

CONTRACT.— *Delivery.*— *Pleading.*— *Complaint.*— *Variance.*— The complaint alleged that the plaintiffs agreed to deliver, and the defendant to receive, at a stipulated price, one hundred stock hogs within twenty days from

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the date of the agreement, at either of two designated scales, where said hogs were to be delivered to the plaintiffs; that the plaintiffs had the hogs ready for delivery at the time and place agreed upon, and notified the defendant to that effect, who refused to receive them. The evidence tended to show that plaintiffs purchased the hogs from different persons and had them ready to be delivered, and that they then notified the defendant of their readiness to deliver, and requested him to be at the scales to receive them, but plaintiffs had not actually driven the hogs to the scales.

Held, that there was a substantial compliance with the contract on the part of the plaintiffs, and that the evidence sustains the complaint in its general scope and meaning.

ARGUMENT OF COUNSEL.—*Allusion to Absence of Defendant in Civil Action.*—

An allusion of counsel, during the closing argument to the jury in a civil cause, to the absence of the defendant, is not available for the reversal of the judgment, when it does not appear that he was harmed thereby.

SAME.—*Statement as to Change of Venue.*—A statement in the closing argument to the jury, that the opposite party had taken a change of venue, is not proper, but if the counsel at once desist upon objection being made, and the court tells the jury that the change of venue had nothing to do with the case, and they should not consider it, there is no available error.

From the Tippecanoe Circuit Court.

R. C. Gregory, W. B. Gregory, R. P. Davidson and J. C. Davidson, for appellant.

W. D. Wallace and A. A. Rice, for appellees.

MITCHELL, J.—Counsel for appellant contend that the judgment of the circuit court should be reversed for two reasons: 1. Because the case as made by the evidence is fatally variant from that alleged in the complaint; and, 2. Because the appellees' counsel in the closing argument indulged in remarks which were not germane to the proper discussion of the evidence, and which were prejudicial to the appellant's cause.

The complaint was in two paragraphs, but as no question is made which especially involves the second, it need not be further noticed.

Briefly stated, the first paragraph of the complaint is this: That the plaintiffs, Carter & Sayers, about the 1st day of July,

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1874, agreed to deliver, and the defendant Carter agreed to receive from them, one hundred stock hogs within twenty days from that date, "at the scales where said hogs were to be delivered to them, in the vicinity of Pleasant Hill, or Wayne Town, in Montgomery county, Indiana," at a price stipulated for, and that the defendant, as a part of the same contract, sold and agreed to deliver to the plaintiffs, on the 1st day of October, 1874, one hundred fat hogs, averaging two hundred and fifty pounds each, to be paid for at a stipulated price, and that twenty dollars was paid on the contract by the plaintiffs to the defendant at the time it was made.

It is then averred that the plaintiffs had the stock hogs ready for delivery at the time and place agreed upon, and notified the defendant to that effect, who refused to receive them, and that at the time agreed upon they demanded of him the fat hogs agreed to be delivered by him to them, and were ready and offered to pay for them the stipulated price, but that defendant refused to deliver the hogs, and that the plaintiffs sustained damage, for reasons properly stated, in the sum of five hundred dollars. .

It is claimed that the proof is fatally variant in that it does not show or tend to show a delivery of or offer to deliver the stock hogs, according to the averment of the complaint, but that the most that can be said of it is that it shows or tends to show an excuse for not delivering or offering to deliver the hogs. The fair import of the contract, as it is averred in the complaint, is that the defendant would receive the hogs at any time within twenty days, upon being notified by the plaintiffs that they had them ready to be delivered at either one of the designated scales which the plaintiffs might select, and give notice to the defendant. *Johnson v. Powell*, 9 Ind. 566.

There was evidence tending to show that the plaintiffs purchased the hogs from several different persons and had them ready to be delivered; that they then notified the defendant of their readiness to deliver, and requested him to be at the

scales to receive them, but they had not actually driven them to the scales. The defendant then repudiated the contract and said that he would not receive the hogs. This was a substantial compliance with the contract on the part of the plaintiffs, and sustains the complaint in its "general scope and meaning."

The averment of the complaint is that the plaintiffs, by the terms of their contract, were to deliver the hogs at the scales at which they were to be delivered to them, and that within the time fixed they notified the defendant that they had the hogs ready for delivery at the time and place agreed upon, and that he refused to receive them. The salutary rule stated in *Thomas v. Dale*, 86 Ind. 435, and other cases, holding that a recovery must be had, if had at all, on the case as made in the complaint, is not to be relaxed. We think, however, that the evidence fairly sustains the averment in the complaint, when interpreted as it was meant by the pleader. *McCarty v. Burnet*, 84 Ind. 23; *Binford v. Johnston*, 82 Ind. 426 (42 Am. R. 508).

It is made to appear by the first bill of exceptions in the record, that during the closing argument to the jury the appellees' counsel said to the jury, "that he would show from the evidence that the defendant James Carter had manufactured three several items of evidence to support his cause, which he proceeded to discuss, one of which was, as said counsel charged, the fabrication of an entry in a book of date 1871, to antedate a transaction of 1872, and after discussing the three alleged attempts to manufacture a defence, he then said to the jury: 'Why isn't Jim Carter here to-day? He is not here to-day. He don't want to be here, and it is well he is not here after making such an exhibition of himself.' The fact being that the defendant James Carter had not been in court during the day, and was not during said argument of said counsel."

The second bill of exceptions recites the following facts:

"On the trial of said cause, and during the closing argu-

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ment for the plaintiffs by counsel to the jury, in speaking of the different trials at which one Matt. Davidson had been a witness in said cause, said that it was in evidence that said Matt. Davidson attended here in Lafayette before the defendant Jim Carter took a change of venue of the cause from Tippecanoe to Montgomery county."

Here counsel for appellant objected to the remark, after which the bill of exceptions proceeds as follows:

"Whereupon said counsel said that he withdrew the remark, and that it was a slip of the tongue, but did not say that defendant had not taken a change of venue as stated, and the court, upon said objection being made, stated to counsel, in the hearing of the jury and to the jury, that the matter of a change of venue had nothing to do with the case, and should not be considered by them, and that it was improper to allude to it, but allowed defendant his exception as to the making of said remark."

The allusion of counsel to the absence of the defendant during the closing argument is to be characterized rather as a question of taste and propriety than as misconduct, and as we can not see how it could have resulted in harm to him, we can not reverse the judgment, especially as the court may have in its instructions, which are not in the record, informed the jury, if, indeed, such information was needed, that the presence or absence of the defendant during the argument of a civil cause is a matter of no consequence.

That allusion was made to the fact that a witness had attended at Lafayette before the defendant took a change of venue, seems to have been an inadvertence for which reparation was promptly made on the spot, both by counsel and the court, and it must be assumed resulted in no harm.

The following from *Worley v. Moore*, 97 Ind. 15, is fully applicable, except that here the court was not silent:

"A statement in argument to the jury, that one of the parties had caused the venue to be changed from the county where the parties reside, is not within the proper line of ar-

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gument, but when the counsel at once desist upon objection being made, there is no available error. Neither can error be predicated upon the silence of the court, where there is no request for an admonition to the jury not to be influenced by the statement."

We agree that counsel should be held to the observance of the rules of debate, especially in the closing argument, where no opportunity of setting right injurious statements, which are improper and outside of the record, is afforded, and this court will not hesitate to inflict the penalty of a reversal for a transgression of the rule when there is a probability that injustice may have resulted, but we can not say in this case that this was probable.

Judgment affirmed, with costs.

Filed April 23, 1885.

No. 11,960.

KELLUM v. THE BERKSHIRE LIFE INSURANCE COMPANY.

LANDLORD AND TENANT.—*Conveyance by Landlord.*—*Attornment.*—Where at the time of the conveyance of real estate by ordinary warranty deed, the premises are in the actual occupancy of the vendor's tenant, the deed transfers the possession without attornment, in this State; the occupant becomes the vendee's tenant, and his mere continued occupancy does not constitute a breach of any covenant in the deed.

From the Marion Circuit Court.

L. M. Campbell, for appellant.

BEST, C.—The appellee conveyed, by warranty deed, a farm in Hendricks county in this State, to the appellant, and this action was brought for breach of one of the covenants of said deed.

The breach alleged was that a portion of the land, twenty-five acres, which was then sown in wheat, was in the possession of the appellee's tenant, who detained such possession for one year after the execution of such deed.

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Issues were formed; a trial had; the facts specifically found; conclusions of law stated; a new trial refused, and judgment rendered for the appellee. These rulings are assigned as error.

The undisputed facts found are these, that the appellee, on the 28th day of October, 1881, by warranty deed, conveyed the land in question to the appellant; that at that time it was in the actual occupancy of tenants whose terms did not expire until the 1st day of March, 1882; that one of them, Byrd, had sown in wheat twenty-five acres of said land, and he retained possession of the same till the wheat was harvested; that three hundred and sixty bushels of wheat, worth seventy-five cents per bushel while standing, was taken from the land, and after it was threshed one-third of it was delivered to the appellant; that on the 1st day of March, 1882, all of said land except the twenty-five acres sown in wheat was leased by the appellant to Byrd, and after the wheat was harvested the appellant leased the residue of the land to Byrd; that Byrd leased said land on the 1st day of March, 1879, for one year, with the agreement that he was to sow wheat in the fall, and that if the appellee should sell the land thereafter and during the year, it was to pay Byrd for the wheat; that Byrd continued to hold said land from year to year thereafter upon the same terms, and was thus holding the land at the time of its conveyance; that the appellant visited the farm before its purchase, talked with Byrd and knew of the terms of his lease.

The breach alleged is the failure to deliver possession, and the facts found do not, as we think, constitute such breach. The actual occupancy of the vendor's tenants at the time of conveyance is deemed the possession of the vendor, and as the deed transfers such possession to the vendee, such occupancy does not constitute a breach of the covenants of the deed. Formerly, when land was thus occupied, a conveyance of the reversion, without an attornment of the tenant, was incomplete, but as the free transfer of land was deemed es-

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sential to its proper enjoyment, this rule was set aside by the enactment of statutes which rendered such conveyances effectual without such attornment, and thereafter the assignees were clothed with all the rights and were subject to all the obligations of the assignors. Thereafter they stood toward the tenant the same as the vendor before the conveyance of the reversion. Taylor Landlord and Tenant, section 439.

Such a statute is in force in this State. R. S. 1881, section 5215.

By this section of the statute, the conveyance is valid without the attornment of the tenant, who thereafter becomes the tenant of the purchaser.

At the common law, after attornment, the occupancy of the tenant could not be deemed a breach of any covenant in the deed. The reason is obvious. The tenant was thereafter the tenant of the purchaser. In contemplation of law the tenant received his possession from such purchaser, and at the expiration of his term was bound to surrender it to him. The statute now accomplishes the same purpose; it transfers the possession. It enables the purchaser to collect the rent, to enforce all other obligations of the tenant, and compels him, at the expiration of his term, to yield the possession to the purchaser. It establishes the relation of landlord and tenant between the parties, and entitles the purchaser to all the remedies applicable to such relation. This being true, it must follow that the mere occupancy of the vendor's tenants can not operate as a breach of the covenants of the deed. This has been so ruled. In *Lindley v. Dakin*, 13 Ind. 388, it was held that the occupancy of a tenant, "where the fact, and the title of the tenant are known at the time to the purchaser, is not a breach of the covenant of right of possession; and that, if no special contract is made, the occupant becomes tenant to the purchaser." The same was held in *Page v. Lashley*, 15 Ind. 152.

As the mere occupancy of the land by the vendor's tenant was not a breach of the covenant for possession, the breach

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of which was alone alleged, this action can not be maintained, though the wheat belonged to the tenant.

Had it been alleged as a breach of the covenant of *seizin*, that the tenant owned the growing wheat, a different question would have been presented. This would have required us to determine whether the tenant, after the sale, was entitled to anything under the terms of his lease other than compensation for his wheat, and if he was not, it is manifest that his detention of the land and his disposition of the wheat can not operate as a breach of any of the covenants contained in the deed. The case is the same as though the tenant had cut and carried away timber to which he was not entitled. Neither act would constitute a breach of the covenants of the deed. As the facts found did not establish the alleged breach, no error was committed in concluding that the appellant was not entitled to recover.

Where facts are found, they must support the cause of action declared upon, and unless they do, the defendant is entitled to judgment though the facts found show the existence of some other cause of action.

The motion for a new trial raises no question, however decided, that can possibly affect the conclusion reached, and, therefore, it need not be more particularly noticed.

This disposes of the only questions in the record, and as no error has intervened, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the appellant's costs.

Filed April 25, 1885.

No. 11,538.

HARTLEP v. COLE.

PRACTICE.—*Judgment on Pleadings.*—*Rule to Answer.*—Where the parties by agreement submit a cause to the court for trial, a plaintiff who has not asked and obtained a rule to answer can not, after a finding by the court, successfully move for a judgment on the pleadings.

101	458
127	255
101	458
165	485

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SAME.—*Right of Trial Court to Change Ruling on Demurrer.*—A trial court may change a ruling on demurrer before trial, and the plaintiff can not complain of the action of the court in setting aside a ruling against him on a demurrer to the complaint and entering one in his favor.

CONSTABLE.—*Execution.*—*Protection of Officer by Writ.*—A constable is protected by a writ regular on its face and issued by a court of competent jurisdiction.

REFPLEVIN.—*Execution Defendant.*—An execution defendant can not maintain an action to recover personal property seized under an execution, except in cases where it affirmatively appears that the property was exempt from execution.

From the Warren Circuit Court.

J. McCabe and *E. F. McCabe*, for appellant.

J. W. Cole, for appellee.

ELLIOTT, J.—The trial court sustained the appellee's demurrer to the second paragraph of the appellant's complaint, but subsequently set aside this ruling and overruled the demurrer. The record, after reciting this ruling, proceeds as follows: "And the issue being joined this cause for trial is submitted to the court, waiving the intervention of a jury." The evidence was heard, the cause taken under advisement, and on the day following the submission for trial a finding was made in favor of the appellee, whereupon the appellant moved for a judgment in his favor on the pleadings, for the reason that there was no answer to the second paragraph of the complaint. There was no error in overruling this motion. The submission of the cause to the court for trial without asking a rule to answer must be deemed a waiver, and we must treat the case as if the allegations of the complaint had been controverted by answer. *Trentman v. Eldridge*, 98 Ind. 525; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510, *vide* p. 516; *Preston v. Sandford*, 21 Ind. 156; *Shirts v. Irons*, 28 Ind. 458; *Ringle v. Bicknell*, 32 Ind. 369.

The appellant had, no doubt, a right to require an answer, but as he voluntarily waived that right by agreeing to submit the cause for trial, he can not insist that the appellee confessed the truth of the allegations of the complaint. It

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would be a vain thing to submit a case for trial where a valid cause of action was confessed, and it can not be presumed that either the parties or the court meant that a cause of action stood confessed; on the contrary, the presumption is the very reverse, for as a trial was agreed upon it is necessarily implied that there was an issue to try. The case is entirely unlike one where a rule has been taken and an attempt made to answer. There can be no presumption in such a case that there was a waiver; while here that is the only reasonable presumption, for without an issue there would be nothing to try, and without an answer there would be no issue.

The appellant has no reason to complain of the course of the court in setting aside an adverse ruling and making a favorable one. If the change in the ruling on demurrer required any new evidence on the part of appellant, or if it had in any way interfered with his preparation for trial, he should have made his application to the trial court for a postponement, or in some appropriate method have brought his objections to the change and his desire for postponement to the attention of the trial court at the time, and not having done anything of the kind, he is not in a situation to be heard to aver that there was error.

On the trial of the cause, the appellee gave in evidence, over the objection of appellant, a judgment against the latter rendered by a justice of the peace. We are inclined to think that the appellee is right in asserting that the objection made by the appellant is too general to present any question; but, waiving the decision of that point, we hold that, conceding that the objection was sufficiently specific, and conceding, also, that it was well taken, still no available error was committed in allowing the record of the judgment to be read in evidence. The action was brought by the appellant to recover possession of personal property seized by the appellee as constable, under an execution issued against the appellant, and, as against the latter, all that it was necessary for the constable to do was to show a writ issued by a court of competent jurisdic-

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tion and fair on its face. It is one of the best established rules of law that an officer is protected by an execution regular on its face and issued by a court of competent jurisdiction. *Rutherford v. Davis*, 95 Ind. 245, *vide* auth. p. 247. The writ, therefore, protected the constable, and it was not necessary for him to produce the judgment on which it issued.

An execution defendant can maintain an action to recover possession of personal property, seized under a writ issued against him, only in cases where he shows that the property is exempt from execution. The statutory provisions upon this subject are very plain and explicit. Other remedies are open to an execution defendant whose property is wrongfully seized, but he can not maintain replevin unless he shows that the property was exempt from execution. *Chinn v. Russell*, 2 Blackf. 172.

Judgment affirmed.

Filed April 25, 1885.

No. 12,151.

STATE, EX REL. YOUNG, v. CUNNINGHAM, EXECUTOR, ET AL.

DECEDENTS' ESTATES.—*Contract of Decedent and Another.*—*Action Thereon.*—*Statute Construed.*—Under the provisions of section 2311, R. S. 1881, an action can not be commenced by complaint and summons against an executor or administrator and any other person or persons, or his or their legal representatives, upon any contract executed jointly, or jointly and severally, by the decedent and such other person or persons; but the holder of such contract can enforce its collection against the estate of such decedent only by filing his claim thereon, as provided in section 2310, R. S. 1881.

PRACTICE.—*Dismissal of Action.*—*Joint Motion.*—*Error.*—Where two or more defendants jointly move the court to dismiss the plaintiff's action, it is error to sustain such motion and dismiss the action, where any one or more of such defendants are not entitled to such dismissal.

SAME.—*Dismissal of Appeal.*—*Joint Motion.*—*Supreme Court.*—Where two or more appellees jointly move the Supreme Court for the dismissal of an appeal, the motion will be overruled, unless it be well taken by each and all who join therein. Where an appeal is properly taken, every

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party to the judgment below is a necessary party to such appeal, and the separate motion of such a party for the dismissal of the appeal must be overruled.

From the Harrison Circuit Court.

W. N. Tracewell and *R. J. Tracewell*, for appellant.

C. W. Cook, for appellees.

HOWK, J.—This suit was commenced by the appellant's relator, James R. Young, on the 3d day of April, 1884, on a guardian's bond executed on the 5th day of May, 1873, by one Hester C. Roberts, then in full life, but since deceased, as guardian of the relator, then a minor, and by the appellees Thomas Strong, John McRae and George W. Fox, as her sureties in such bond. It was alleged in the relator's complaint, among other things, that his guardian had died testate in 1881; that since her death the appellee Cunningham had qualified and was acting as the executor of her last will; that before his guardian's death the relator had become twenty-one years of age, and that such guardianship had accordingly ceased. Several breaches of the condition of such bond were then assigned by the relator, and he demanded an allowance against the estate of his deceased guardian, and a judgment against her sureties for the sum of \$2,000, and for all proper relief.

The appellees appeared specially, and jointly moved the court below in writing to dismiss the relator's action, for the following causes:

"1st. That the action is commenced by complaint and summons, contrary to law, and plaintiff's claim has not been filed in the clerk's office of such county against the estate of the decedent; and,

"2d. Because the bond sued on is a joint and several obligation, and, therefore, the defendants can not be joined with the executor of their deceased co-obligor in an action thereon."

This motion was sustained by the court, and the suit was accordingly dismissed, at the relator's costs.

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The relator has appealed, and has here assigned as error the decision of the court in the dismissal of his suit.

All the appellees jointly, and the appellee Cunningham, executor, separately, move this court to dismiss the appeal herein, upon the ground that the decision below grew out of a "matter connected with a decedent's estate," and the appeal was not taken within the time nor in the manner prescribed by sections 2454 and 2455, R. S. 1881.

The joint motion of all the appellees to dismiss the appeal must be overruled. Certainly the appellees Strong, McRae and Fox are not entitled to the dismissal of the appeal upon the ground assigned in such joint motion; for, as to them, the decision below from which this appeal is prosecuted could not, and did not properly, grow out of any matter connected with a decedent's estate. As to them, the suit of the appellant's relator was an ordinary civil action, and the procedure therein in the court below, and in the appeal therefrom to this court, ought to be, and is, governed by the provisions of the civil code. As to them, and as to the judgment which they recovered in this suit against the relator, the latter had the undoubted right, under the provisions of sections 632 and 633, R. S. 1881, of the civil code, to take his appeal to this court "within one year from the time the judgment" was rendered. The relator perfected his appeal in this cause by filing in the office of the clerk of this court a certified transcript of the record and his assignment of errors thereon, within one year from the rendition of the judgment below. It is clear, therefore, that as to the appellees Strong, McRae and Fox, the motion to dismiss the appeal is not well taken, and can not be sustained; and, being the joint motion of all the appellees, it is equally clear, we think, that as to all the appellees such motion must be, and accordingly is, overruled.

We are of opinion, also, that the separate motion of the appellee Cunningham, executor, to dismiss this appeal, ought not to and can not be sustained. The judgment appealed from is a joint judgment, in favor of all the appellees

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and against the relator. Under the provisions of section 635, R. S. 1881, of the civil code, and under the practice of this court, as settled by a long and unbroken line of its decisions, all the parties to the judgment appealed from are necessary parties to such appeal, and the failure to make any party to such judgment a party to such appeal, of itself, affords sufficient ground for the dismissal of the appeal. *Reeder v. Maranda*, 55 Ind. 239; *Herzog v. Chambers*, 61 Ind. 333; *Pierson v. Hart*, 64 Ind. 254; *Hendricks v. State, ex rel.*, 73 Ind. 482.

There is nothing in the statute providing for the settlement of decedents' estates, and regulating appeals to this court from any decision of any matter connected with any such estate, which contravenes the rule of practice which requires that all the parties to the judgment appealed from must be made parties to such appeal. The appellee Cunningham, executor, etc., being a party to the judgment appealed from herein, is a necessary party to this appeal, and, therefore, his separate motion to dismiss the appeal is overruled.

We come now to the consideration of the only question presented for decision by the relator's assignment of error, namely, Did the circuit court err in sustaining the joint motion of all the appellees to dismiss the relator's suit? We are clearly of the opinion that this question must be answered in the affirmative. As to the appellees Strong, McRae and Fox, there can be no doubt, we think, that the action was well brought by complaint and summons; indeed, as to them, it could not well have been brought otherwise, except upon their voluntary appearance. Under repeated decisions of this court, prior to September 19th, 1881, when the act of April 14th, 1881, "providing for the settlement and distribution of decedents' estates," took effect and became a law, the action would have been well brought, "by complaint and summons," against all the appellees. *Braxton v. State, ex rel.*, 25 Ind. 82; *Hays v. Crutcher*, 54 Ind. 260; *Ferguson v. State, ex rel.*, 90 Ind. 38.

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But in section 87 of the last mentioned act (section 2311, R. S. 1881), the General Assembly in effect overruled these and similar decisions of this court, upon the point under consideration, and provided as follows:

“No action shall be brought by complaint and summons against any executor or administrator and any other person or persons, or his or their legal representatives, upon any contract executed jointly, or jointly and severally, by the deceased and such other person or persons, or upon any joint judgment founded thereon; but the holder of said contract or judgment shall enforce the collection thereof against the estate of the decedent only, by filing his claim as provided in the preceding section.”

Of course, the provisions of this section of the statute are not open to judicial construction, for they are too plain to be misunderstood. The policy of such legislation is not a proper matter for our consideration; it is enough for us to know that the provisions of the statute are the proper subjects of legislation. It is very clear, we think, that under the provisions of section 2311, above quoted, this action was improperly brought by complaint and summons as against the appellee Cunningham, executor, and if, for this cause, he had separately moved the court to dismiss the suit as against himself only, it would have been error, as it seems to us, to have overruled his motion. He had the right to insist that the relator's claim against the estate of his testatrix should be brought before the court only in the manner provided in section 2310, R. S. 1881. *Morrison v. Kramer*, 58 Ind. 38. But, surely, he had no right, either separately or jointly with his co-appellees, to move the court to dismiss the action as to all the appellees. Where two or more defendants jointly move the court to dismiss the action, the motion must be well taken as to all who join therein, otherwise such motion must be overruled.

For the reasons given, we are of opinion that the court

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below erred in sustaining the joint motion of all the defendants to dismiss the relator's action.

The judgment is reversed with costs, and the cause is remanded with instructions to overrule the motion to dismiss the action, and for further proceedings not inconsistent with this opinion.

Filed April 21, 1885.

No. 11,925.

FLEMING ET AL. v. HIGHT ET AL.

FREE TURNPIKE.—*Appeal.—Proof of Number of Petitioners.*—On an appeal to the circuit court from an order of the board of county commissioners for the making of a free turnpike, in a proceeding under section 5091, *et seq.*, R. S. 1881, the proceeding stands for trial *de novo* in the circuit court, and upon such trial the burden is on the petitioners for the improvement to prove that when said order was made by said board, the petition had been signed by the proper number of persons, as required by section 5095, R. S. 1881.

SAME.—*Appeal Bond.—Time of Filing.*—Such an order having been made by the board of county commissioners on the 7th of June, an appeal bond was filed and approved on the 7th of the next month.

Held, that the bond was filed within thirty days after the decision and in proper time.

From the Monroe Circuit Court.

E. K. Millen, M. F. Dunn and R. A. Fulk, for appellants.
J. W. Buskirk and H. C. Duncan, for appellees.

COLERICK, C.—The appellees presented to the board of commissioners of Monroe county their petition for the construction of a free gravel road, under the statute authorizing the construction of such roads (R. S. 1881, section 5091, etc.), accompanied with a bond, as required by the statute, and, thereupon, the board appointed viewers and a surveyor to view the proposed route, and, if they found that the improvement petitioned for would be of public utility, to lay out and mark the road, and designated a time and place for the meet-

101	400
133	96
101	400
143	522

ing of the viewers and surveyor for that purpose, and directed the auditor of the county to give notice by publication of the time and place of said meeting, as provided by law, which notice was properly given, as directed. Afterwards the viewers and surveyor reported to the board that they had viewed the proposed road, and, having determined that the improvement prayed for would be of public utility, had laid out and marked said road as described in their report; and they presented with, and as a part of, their report, a list of the lots and lands that would be benefited by the improvement, and which ought to be assessed for the expenses of the same. The board approved the report, and ordered the improvement to be made. No one at any time appeared before the board in opposition to the proceeding. After said order was made, and before any further steps were taken in the matter, the appellants, within the time allowed by law for that purpose, appealed from the decision of the board ordering said improvement to be made to the circuit court, by filing with the county auditor an affidavit and bond, which, under the statute, entitled the appellants to such appeal.

In the circuit court the appellees moved to dismiss the appeal upon the alleged grounds:

1. That the appeal had been prematurely taken, that is, before the proceeding had been finally disposed of by the board of commissioners.

2. That the matters presented by the affidavit filed by the appellants to obtain their appeal were such as could not be tried in the circuit court.

3. That no questions except those of a jurisdictional character were presented by the record, and that by reason of the non-appearance of the appellants to the proceedings before the board of commissioners, all objections to the questions thus presented had been waived.

4. That as the appellants did not appear before the board of commissioners, the affidavit and appeal bond did not make them proper parties to the cause in the circuit court.

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The motion to dismiss the appeal was sustained, and from that decision the appellants appealed to this court, where the judgment of the court below was reversed. See *Fleming v. Hight*, 95 Ind. 78. It was then said by this court, NIBLACK, J.: "The order of the board of commissioners establishing the road laid out and marked by the viewers, and directing its construction, was such an order as might be appealed from to the circuit court," and, after citing many decisions of this court to that effect, continued: "These cases, with others which might be cited, also recognize, and, in various ways, affirm, the legal proposition that, upon an appeal from the decision of a board of commissioners in a case like this, the circuit court takes jurisdiction of the proceedings appealed from as an original cause, and not as an appellate court charged with a review merely of those proceedings upon specific objections urged, or errors assigned, by the appellant, and the appellant is not precluded by the proceedings from which he appeals, except in preliminary or incidental matters to which, when opportunity was afforded him, he failed to make objection before the commissioners. Therefore, the cases cited by counsel, which hold that certain proceedings had before boards of commissioners are impervious to collateral attack, have no application to cases in which such proceedings have been directly appealed from to the circuit court, and consequently stand for trial *de novo* in that court."

Upon the remanding of the cause to the court below, it reconsidered its action in dismissing the appeal and overruled the motion to dismiss the same, and thereupon the appellees made another motion, founded upon other alleged grounds, to dismiss the appeal, which motion, to which we will hereafter more fully refer, was overruled. The cause was then tried by the court, and at the request of the parties the court made a special finding of the facts therein and stated its conclusion of law thereon, as follows:

"1. I find that on the 25th day of April, 1883, the following petition was filed before the board of commissioners

of Monroe county." (Here the petition which was presented to the board by the appellees for the construction of the proposed gravel road was set forth.)

"2. I find that said petition was signed by Wallace Hight, Emily Hight, William A. Rogers, James M. Howe, H. C. Duncan and William Burke, Jr., and that said subscribers are land-holders, whose lands will be assessed for the cost of said improvement.

"3. I find that said petitioners filed a bond as required by law, signed by Wallace Hight and Henry Henley, which bond was approved by the board.

"4. I find that thereupon the board appointed William Lyford, John Harrell and William Streat, who were disinterested freeholders of Monroe county, to act as viewers, and Henry Henley to act as surveyor and engineer, and appointed the 21st day of May, 1883, for said viewers and engineer to examine, view, lay out and straighten said road.

"5. I find that the auditor of said Monroe county gave notice of the filing of said petition, and the appointment of said viewers and said engineer, as required by law, which notice is in the words and figures as follows:" (Here the notice referred to is recited.)

"6. I find that on the 7th day of June, 1883, said viewers and engineer filed their report before said board, which report reads in the words and figures as follows:" (Here the report is fully set forth.)

"7. I find that upon the filing of said report the following proceedings were had before said board, as shown by the records of said board, as follows:" (Here the order of the board of commissioners ordering said improvement to be made, and specifying the manner in which it should be made, and appointing viewers to apportion the estimated expenses of the improvement upon the real estate described in the report of the first viewers according to the benefits to be derived therefrom, was set forth.)

"8. I find that at no time during the pendency of said

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proceeding did any one appear before said board and object to any part of said proceedings.

"9. I find that on the 7th day of July, 1883, Lewis Weymer and Stephen Fleming filed the following affidavit in the auditor's office of said Monroe county:" (Here the affidavit that was filed by the appellants, to enable them to appeal from the decision of the board, is set forth); "and also on said 7th day of July, 1883, they filed the following appeal bond:" (Here the bond is recited.)

"From which finding of facts, I find as a conclusion of law in favor of the plaintiffs and against the defendants Fleming and Weymer, to which said conclusion of law the said defendants at the time objected and excepted.

"FRANCIS WILSON, Judge."

And thereupon the appellants moved the court for a new trial, for the following reasons:

1. Because the finding and decision of the court was not sustained by sufficient evidence.

2. Because the finding and decision of the court was contrary to law.

3. Because of error of law occurring at the trial, in this, the court erred in refusing to allow the appellants to prove that the petition filed before the board of commissioners and introduced in evidence in this cause, upon which the board made the order appealed from in this case, was not at any time signed by a majority of the resident land-owners whose lands were reported as benefited and ought to be assessed, nor the owners of a majority of the whole number of acres of the lands reported as benefited and liable to be assessed for the cost of the improvement mentioned in said order.

The motion for a new trial was overruled, and judgment rendered in favor of the appellees, from which the appellants appeal to this court, and assign as errors that the court below erred in its ruling on the motion for a new trial, and in its conclusion of law upon the facts specially found.

The principal question presented for our consideration is,

Was it essential for the court to find as a fact that, at the time of the making of the order by the board of commissioners ordering the proposed improvement to be made, the petition therefor had been signed by the number of persons required by the statute under and by virtue of which alone the making of the improvement was authorized? We think so. The statute provides: "Upon the return of the report mentioned in the last section" (referring to the report of the first viewers), "the commissioners shall, if in their opinion public utility require it, enter upon the record an order that the improvement be made; which order shall state the kind of improvement to be made, the width and extent of the same, and the lands which shall be assessed for the expense of the same; but such order *shall not* be made until a majority of the resident land-holders of the county whose lands are reported as benefited and ought to be assessed, and also the owners of a majority of the whole number of acres of all lands that are reported as benefited and ought to be assessed, shall have subscribed the petition mentioned in the second section of this act" (referring to the petition for the improvement), etc. R. S. 1881, section 5095.

This provision of the statute is mandatory. It expressly prohibits the board of commissioners from making such order until the petition is so signed. It was evidently enacted to prevent a minority of those who would be affected by the improvement from imposing by their action burdens in the form of taxation upon the property of the others, without their consent. Such statutes have always been, and must be, strictly construed. If a board of commissioners, in defiance of the plain provisions of the statute, order such an improvement to be made, when the petition therefor is not signed by the number of persons required by the statute, its order so made will be, on appeal therefrom, vacated, for the want of power on the part of the board to make it.

In *Doctor v. Hartman*, 74 Ind. 221, it was correctly said by this court, that "The commissioners' court, as is well known,

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is one of special limited jurisdiction, possessing only such powers as the statute confers. Not only is its jurisdiction restricted, but the mode of exercising the authority conferred is a limited statutory one. * * * The general doctrine which applies to the proceedings of the board of commissioners is well stated and applied in *White v. Conover*, 5 Blackf. 462. It was there said: 'We conceive the law to be, that when statutory powers are conferred upon a court of inferior jurisdiction, and a mode of executing those powers is prescribed, the course pointed out must be substantially pursued, or the acts and judgments of the court are *coram non judice* and void.' This doctrine has been approved over and over again by this court."

In the case under consideration, the appeal from the order of the board of commissioners operated, for the purposes of the appeal, as a vacation of the order. See *Grimwood v. Macke*, 79 Ind. 100. And, therefore, it devolved upon the appellees, on whom the burden of proof rested, to establish by proper and sufficient proof the fact, if it existed, that the petition for the improvement had been signed by the requisite number of persons, and in the absence of such proof the finding of the court should have been in favor of the appellants, regardless of the finding of the board of commissioners. As no such proof was made, the court erred in overruling the motion for a new trial, as the evidence introduced was insufficient to sustain the finding of the court. It also follows from the views above expressed, that, in our opinion, the court below erred, for the reasons stated, in excluding the evidence offered by the appellants, and referred to in the third specification of their motion for a new trial, and for the error so committed the judgment ought to be reversed.

The appellees have assigned by way of cross error, that the court below erred in overruling their last motion to dismiss the appeal. The reasons assigned in support of the motion were:

1. That the appeal bond was not filed in time.

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2. That the bond was executed by persons who were parties to the proceeding.

3. That Benton Hough, the surety on the bond, had signed the petition for the improvement.

4. That the original papers in the proceedings appealed from were not transmitted to the circuit court with the transcript of the proceedings.

5. That the appellee Weymer had signed the petition for the improvement upon which the order appealed from was based.

It appears by the record that the order from which the appeal was taken was made on the 7th day of June, 1883, and the appeal bond was filed and approved on the 7th day of July, 1883. The bond was filed within thirty days after the time the decision appealed from was made, and in time. R. S. 1881, section 5773. The facts upon which the other causes specified in support of the motion were founded do not sufficiently appear in the record to justify us in holding that the court erred in overruling the motion; for aught that appears it was properly overruled.

PER CURIAM.—The judgment of the court below is reversed, at the costs of the appellees, and the cause is remanded, with instructions to the court to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

Filed April 25, 1885.

No. 11,941.

DUNKLE ET AL. v. NICHOLS.

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PLEADING.—*Written Instrument.*—*Reference to Copy of Instrument.*—A pleading containing the statement, "The said note is in the words and figures following, to wit (here insert 'Exhibit A,' which is filed herewith and made a part hereof,)" refers with reasonable certainty to the copy of the note filed with the pleading.

PROMISSORY NOTE.—*Demand.*—It is not necessary to aver or prove a de-

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mand for payment of a promissory note, designating the time of payment thus: "On or before December 25th, 1881, after date, I promise to pay to the order of Mary Nichols five hundred and twenty-five dollars."

From the Montgomery Circuit Court.

J. M. Thompson, W. B. Herod and W. H. Thompson, for appellants.

E. C. Snyder, for appellee.

ELLIOTT, J.—The reference to the promissory note upon which the complaint is founded is not made in the most appropriate method, but it is nevertheless so made as to identify the instrument and incorporate it into the complaint. The reference is thus made: "That said note is in the words and figures following, to wit (here insert 'Exhibit A,' which is filed herewith and made a part hereof)." It appears with reasonable certainty that the note is filed as an exhibit and is the one upon which the complaint is based. This is sufficient. *Friddle v. Crane*, 68 Ind. 583; *Carper v. Kitt*, 71 Ind. 24; *Wall v. Galvin*, 80 Ind. 447.

It is not necessary to aver and prove a demand for payment of a note, designating the time of payment in these words: "On or before December 25th, 1881, after date, I promise to pay to the order of Mary Nichols five hundred and twenty-five dollars."

Judgment affirmed.

Filed April 25, 1885.

No. 12,036.

ROBERTSON v. HUFFMAN ET AL.

PRACTICE.—*Using Bill of Exceptions on Former Trial as Evidence.*—*Motion for Judgment.*—Where, upon a trial of issues of fact, the evidence consisted of a bill of exceptions containing the evidence introduced on a former trial of such issues, together with a written agreement as to additional facts, and the finding was for the defendant, *Held*, that a motion would not lie for judgment for the plaintiff, upon the

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ground that the evidence was written and sustained the complaint, and that no defence was proved.

SAME.—Supreme Court.—Conflicting Testimony.—The Supreme Court can not weigh conflicting testimony, whatever the form in which it may be presented, but, having regard to the burden of proof, will sustain the decision of the trial court upon the evidence, where it in any degree tends to sustain such decision.

From the Washington Circuit Court.

S. B. Voyles and *H. Morris*, for appellant.

J. A. Zaring, *D. M. Alsbaugh* and *J. C. Lawler*, for appellees.

BLACK, C.—The appellant sued the appellees John and William H. Huffman on a judgment, and made the appellee Mary A. Huffman a defendant, for the purpose of setting aside a conveyance of certain land executed by said William to said Mary, as having been made with intent to hinder and delay the collection of the debt represented by said judgment.

Issues were formed and tried, and a judgment was rendered, which, on appeal brought by the plaintiff to this court, was reversed. *Robertson v. Huffman*, 92 Ind. 247.

On the return of the cause to the court below, a demurrer to a paragraph of the answer of said William was sustained as ordered by this court, and another trial was had before the court, which resulted in a finding for the plaintiff, against the defendants John Huffman and William H. Huffman, and for the defendant Mary A. Huffman, against the plaintiff.

The plaintiff moved for a new trial as against the defendant Mary A. Huffman, and this motion having been overruled, he moved for judgment in his favor against the defendants, including said Mary, and this motion also was overruled. Thereupon, judgment was rendered for the plaintiff against the defendants John and William for \$1,500, and in favor of the defendant Mary against the plaintiff.

The appellant has assigned as errors the overruling of his motion for judgment in his favor against the appellee Mary A. Huffman, and the overruling of his motion for a new trial. In the motion for judgment, the ground stated was that the

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evidence was all written and showed that the plaintiff's complaint was true as against all the defendants, and that no defence was proved.

On the trial, no witnesses were introduced, but the parties agreed in writing that, instead of introducing the witnesses, the bill of exceptions on file should be used and taken as the evidence, and that to the testimony therein of one of the witnesses named, a certain statement of matter of fact should be added, and the parties, in said writing, also made an agreed statement of certain other facts. Said bill of exceptions and said agreement in writing were introduced as the evidence.

There was no agreed case under section 553, R. S. 1881, the questions of law arising on which may be saved by an exception to the finding thereon; nor was there an agreement upon the trial of issues of fact as to the facts on which such issues were to be decided; but there was a trial of issues of fact upon what, for the most part, was an agreement that certain testimony of witnesses upon a former trial, and certain documentary evidence introduced thereon, should be taken and treated as if again given and introduced in like manner on this trial.

The question which the appellant thus sought to raise by his motion for judgment could be presented only by a motion for a new trial, as if all the evidence on the trial of the issues had consisted of an agreed statement of the facts. See *Fisher v. Purdue*, 48 Ind. 323; *Manchester v. Dodge*, 57 Ind. 584; *Zeller v. City of Crawfordsville*, 90 Ind. 262; *Lofton v. Moore*, 83 Ind. 112; *Slessman v. Crozier*, 80 Ind. 487; *Pennsylvania Co. v. Niblack*, 99 Ind. 149.

The reasons assigned in the motion for a new trial were: *First*. That the decision was not sustained by sufficient evidence. *Second*. That it was contrary to law, in that the evidence being written, and showing that the complaint was true, the decision should have been against Mary A. Huffman, as well as against the other defendants.

Perhaps, if the complaint, sufficiently showing a fraudu-

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lent conveyance, denied generally by said Mary's first paragraph of answer, was true, neither the second nor the third paragraph of her answer, each of which presented specially a good defence for her, could have been true; but the second ground stated in the motion can not be regarded as a reason for a new trial within the meaning of the statute, and it need not be further noticed.

In considering the evidence in such a case, the presumption in favor of the decision of the trial court which, when that court has seen and heard the witnesses, is permissible solely for that reason, can not be indulged; but this court can not, in any case, weigh conflicting testimony, whatever the form in which it may be presented, and, having regard to the burden of proof, we always uphold the decision of the trial court upon the evidence, where it in any degree tends to sustain such decision. Whether there was an intent to defraud as charged was a question of fact, and the burden of proof was upon the plaintiff.

We have examined the voluminous evidence, and while we think that it, perhaps, would have upheld a finding that the conveyance was fraudulent, yet it was not such as to require such a finding, and we can not reverse the conclusion reached without unjustifiable encroachment upon the province of the trial court.

The judgment should be affirmed.

PER CURIAM.—Upon the foregoing opinion, the judgment is affirmed, at the appellant's costs.

Filed April 8, 1885; petition for a rehearing overruled May 13, 1885.

No. 12,037.

BRYAN v. ULAND ET AL.

DESCENT.—*Widow.*—*Childless Second Wife.*—*Forced Heirs.*—*Estoppel.*—Where an owner of real estate dies, leaving a widow by whom he has no children, and leaving children by a previous wife, the widow, under section

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125	379
126	427
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137	133
139	65
101	477
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101	477
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2483, R. S. 1881, takes a portion of the deceased husband's real estate in fee simple, free from all demands of his creditors, and, under section 2487, R. S. 1881, such children, at her death, become her forced heirs as to the land so acquired by her, which descends to them without regard to any conveyance she may have made. Improvements placed thereon by her inure to their benefit at her death, as do also improvements made thereon during her life by one in possession under her conveyance taken with knowledge of the facts. During her life, the quitclaim of adult children of such decedent, or the conveyance under order of court of the guardian of his minor children, can not convey any estate in the widow's portion; nor will such children be estopped from asserting title to such portion, after her death, by such conveyances and the receipt by them during her life of the purchase-money therefor, especially where the purchaser had notice of the facts.

SAME.—Partition.—After-Acquired Title.—The judgment, whatever its form, in a suit for the partition of the deceased husband's real estate, between such widow and children, the title not being in issue, could not affect the interest acquired by the children as forced heirs upon the death of the widow.

From the Greene Circuit Court.

A. G. Cavins, E. H. C. Cavins and W. L. Cavins, for appellant.

L. Shaw and J. S. Bays, for appellees.

MITCHELL, J.—Counsel on both sides agree that the facts are correctly stated in a special finding made by the court.

It appears that John Uland died in the year 1862, the owner of several tracts of land in Greene county. He left surviving him his widow, Nancy Uland, who was his second wife without a child or children, and he also left six children by a previous marriage.

At the September term, 1863, of the Greene Circuit Court, there was set off to the widow, in a partition proceeding instituted by her, the tract of land in controversy in this case. The residue of the lands of which the decedent died seized, were in the same proceeding, to which all the heirs were parties, set off to the appellees, his children, as tenants in common.

It was recited in the decree that the widow was the owner of a life-estate in the land set off to her, and that the children owned the fee simple in the whole.

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On the 28th day of October, 1864, the adult heirs of John Uland conveyed by quitclaim deed all their interest in the real estate of which their father died seized, including that set off to the widow, to Michael Tribbey, and on the 17th day of January, 1865, the guardian of the minor heirs, pursuant to an order of the probate court, made a like conveyance of the interest of his wards to the same person. On the 3d day of December, 1864, the widow, Nancy Uland, made a quitclaim deed for her interest in the tract set off to her to Tribbey, who at that time took possession of the whole property and held it until his death. After the death of Tribbey, Bryan, the appellant, acquired whatever estate he took in the lands, from his heirs, and went into possession.

It is found by the court that both Tribbey and the appellant had notice, at the time of their respective purchases, that Nancy Uland was the second wife, without children, of John Uland, and that she was in life, and that appellees were children of a previous marriage.

Both made valuable improvements and paid the taxes on the land in dispute during the lifetime of the widow, and it was also found that the appellees each received his or her share of the purchase-money during her lifetime.

The widow died in February, 1880, and the appellees, the surviving children of John Uland, commenced this suit on the 9th day of May, 1882, to quiet their title to the land set off to the widow under the proceedings in partition.

Upon the facts found, the court stated, among other conclusions of law, that the appellees were the owners as tenants in common of the land in controversy; that they were not estopped by the recitals in the decree of partition, nor by their quitclaim deeds, nor by reason of having received the purchase-price of the land during the lifetime of the widow; and that the purchaser was not entitled to an allowance for improvements made while occupying the land during her lifetime.

There was for a time some apparent uncertainty concerning the estate which the childless second wife took in the real

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estate of her husband at his death, but it is now settled by repeated decisions that under section 2483, R. S. 1881, such widow, in virtue of her marital rights, takes one-third of her husband's real estate in fee simple, free from all demands of creditors.

The only difference between the estate of a first wife and a childless second wife is created by the proviso to section 2487, R. S. 1881, by which the deceased husband's children of the previous marriage become, at the death of the childless second wife, her forced heirs, as respects all lands acquired by her in virtue of such second marriage. *Utterback v. Terhune*, 75 Ind. 363; *McClamrock v. Ferguson*, 88 Ind. 208; *Hendrix v. McBeth*, 87 Ind. 287; *Slack v. Thacker*, 84 Ind. 418; *Flenner v. Benson*, 89 Ind. 108; *Flenner v. Travellers Ins. Co.*, 89 Ind. 164; *Caywood v. Medsker*, 84 Ind. 520; *Armstrong v. Cavitt*, 78 Ind. 476; *Louden v. James*, 31 Ind. 69.

Under the construction which this proviso has received in the foregoing cases, the estate of the widow, although a fee simple, was subject to such limitation as that at her death it descended to her deceased husband's children without regard to any conveyance she may have made during her lifetime. *Flenner v. Benson*, *supra*. And as, during her lifetime, such children had no interest or estate in the land, nothing but an expectancy to take it as her heirs at her death, neither the quitclaim deed of the adults, nor the guardian's deed of the minors, conveyed any estate to Tribbey. *Flenner v. Travellers Ins. Co.*, *supra*.

A quitclaim deed is effectual to pass the estate which the grantor has at the time it is made, and no more; it does not estop him from asserting an after-acquired interest. *Avery v. Akins*, 74 Ind. 283; *Graham v. Graham*, 55 Ind. 23. Nor does the fact that the purchase-money was received during the lifetime of their step-mother estop the appellees from setting up their title subsequently acquired. Especially is this so in this case, where the purchaser had notice of all the facts at the time he purchased and paid the money. *Avery v.*

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Akins, supra; *Scranton v. Stewart*, 52 Ind. 68; *Long v. Anderson*, 62 Ind. 537.

The appellant claims that the judgment in the partition proceedings estopped the appellees from saying that they were not the owners in fee simple at the time they made their deeds to Tribbey. The decree in partition did not attempt to settle any question of title between the parties, and as partition proceedings, except where the title is directly put in issue, serve only to sever the shares of the common tenants, the judgment, whatever form it may have taken, did not affect after-acquired interests. The judgment is not a vesture of title; it only separates the several interests then held. *Miller v. Noble*, 86 Ind. 527, and cases cited.

The fact that the estate of the widow was sold and conveyed by her to the appellant's grantor, and that he was put in possession and made valuable improvements on the land, did not in any respect make the appellees liable for their value. If the widow had remained the owner of the land until her death, it, with whatever improvements she made thereon, would have descended to the children of her deceased husband. The improvements which she would have made would have enured to their benefit in the same way that improvements made by an ancestor enure to the benefit of the heir, and that the improvements were made by the grantee of the widow, during her lifetime, can make no difference.

It is only *bona fide* occupants of lands who have the right to claim the benefit of improvements made while in possession under color of title. Both the appellant and his grantor had knowledge of the appellees' rights, and are, therefore, not within the rule. *Woodhull v. Rosenthal*, 61 N. Y. 382.

We have examined the point made on the cross error assigned, and conclude that there was no error in the ruling of the court, which is available to the appellees.

Judgment affirmed, with costs.

Filed May 12, 1885.

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Reasoner *et al.* v. Creek *et al.*

No. 11,839.

REASONER ET AL. v. CREEK ET AL.

DRAINAGE.—*Right of Property Owner not Assessed with Benefits or Damages to Remonstrate.*—A property owner whose land will be injured by the construction of a ditch has a right to appear and remonstrate, although no damages are assessed in his favor, and although no benefits are assessed against his land.

From the Blackford Circuit Court.

J. Cantwell, S. W. Cantwell and W. A. Bonham, for appellants.

ELLIOTT, J.—The appellees were petitioners for the establishment and construction of a ditch. The appellants, within ten days after the filing of the report of the commissioners of drainage, filed separate remonstrances, in each of which the remonstrant alleged that he was the owner of real estate, and gave a particular description of it, and stated that he was not assessed for benefits or damages, but that his land would be greatly affected by the construction of the proposed ditch, in that its construction as proposed would overflow his land, without giving him any outlet for the drainage thereof, thereby rendering it impossible for him to properly drain and cultivate it. It is also alleged in each of the remonstrances, "that the report of the commissioners is not according to law; that the land will be damaged in the sum of seven hundred dollars, because the construction will cause the overflow of the land, and no damages have been assessed; that the damages will exceed the benefits; that the proposed ditch will neither improve the public health, nor benefit any public highway, nor be of public utility." On motion of the appellees the remonstrances were rejected, and it is the ruling on this motion that is presented for review.

It seems clear on principles of natural justice that the law will not allow a man's land to be directly and materially in-

jured by a public work of this character, and yet leave him remediless. It is evident, also, that such a course would be antagonistic to the spirit of the constitutional provision, that no man's property shall be taken for a public use without just compensation. So, too, it seems that the public and adjacent land proprietors can not justly secure a benefit to themselves at the expense of a serious injury to another's property. But the case made by the remonstrance is stronger than if it were conceded that the construction of the ditch would be a public benefit, for, as appears from our synopsis of the facts stated in each of the remonstrances, the ditch would not benefit the public. As it would not benefit the public, it must necessarily result that it would only benefit private persons, and no principle of law is more firmly settled than that private property can not be taken for a private purpose. It is true that there does not appear to be a direct taking, but an injury to land to the extent of several hundred dollars is, in a restricted sense, at least, a taking. We suppose that if the construction of a ditch would submerge adjacent lands and render them valueless, there could be no doubt that the owners would be entitled to compensation. But, whether there was or was not a seizure of property, there was, upon the case made by each of the remonstrances, a direct and material injury, and in our judgment the statute does not mean to authorize the construction of a ditch without compensation to those whom it would directly injure. Whether a statute would be valid which undertook to authorize the construction of a ditch without providing for compensation for injuries resulting to private property, we need not decide, as our opinion is that the statute contemplates the assessment and payment of damages to all who suffer a direct injury from the construction of a ditch.

If a property owner whose land would be injured by overflows which the construction of a ditch would cause can not secure just compensation because the ditch commissioners decide that it is not necessary to assess him with benefits or

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damages, then, all that need be done to defeat his rights would be to leave such property out of consideration. Plainly, this would be unjust. We can see no reason for holding that a property owner must be denied compensation for injuries merely because the ditch commissioners have not deemed it proper to investigate and report upon his rights, or because the petitioners have not described his land in their petition. The ultimate and substantial question is, will the complainant's land be directly injured? not was his land described in the petition or mentioned in the report of the commissioners? It is not in the power of the petitioners or of the commissioners to cut him off from his right to compensation, for that right does not depend upon what the petitioners or the commissioners may do, or omit to do, but upon the fact of a direct and material injury to his land. If it is ascertained that he will sustain a legal injury entitling him to compensation, the law awards it to him, and no act or omission of petitioners or commissioners can keep it from him. If the facts and the law entitle him to compensation, what has been done or left undone by the petitioners and commissioners is of no importance.

The principles which we have stated demonstrate the right to compensation in cases such as those made by the remonstrants, and the only question is as to the remedy. If it be established that there is a legal right, then there must be a remedy, for the ancient maxim, "There is no right without a remedy," rules the case.

We can conceive of no just reason why the land-owner may not invoke the assistance of the courts for the vindication of his right, by becoming a party to the original cause and asserting his rights by a remonstrance. Such a procedure has the great merit of simplicity and directness; it has also the merit of preventing multiplicity of actions, and of settling the controversy before the work of constructing the ditch has been actually entered upon. These are important considerations, for the law abhors a multiplicity of actions, encour-

ages diligence, seeks simplicity, and discourages circumlocution. Where there is a direct road to the complete settlement of a controversy, it is always preferable to a roundabout one. We are to keep these fundamental doctrines in mind in construing the statute, for we are not to presume, unless the rigor of the language drives us to that course, that the Legislature meant to overthrow settled and salutary principles. We find nothing in the statute requiring us to deny a land-owner, who will be injured by the construction of a ditch, the right of remonstrating, although no benefits are assessed against him, nor damages assessed in his favor. The language of the statute is this: "Upon the making of such report to the court, ten days shall be allowed to any owner of lands affected by the work proposed to remonstrate against the report." Acts 1883, p. 176, sec. 3.

A person whose land is injured to the extent of seven hundred dollars, or to any material extent, comes within the description "any owner of lands affected by the work proposed." It is true that in enumerating the causes for a remonstrance the question of benefits and damages appears to be restricted to persons actually assessed, but there are other causes which it seems clear may be urged by persons not assessed. This is notably true of the first, seventh, eighth and ninth causes enumerated. But we do not think that the failure to enumerate the causes properly should be treated as denying a land-owner, whose property is affected, the right of remonstrating, since such a construction would completely nullify the clause we have quoted, and as the rule is, that all the words of a statute shall be given effect, and no word or clause be treated as meaningless or superfluous, we must avoid that result if possible. This can be accomplished without doing violence to the letter or spirit of the act, by holding that the enumeration is not complete or exhaustive as to parties against whom no assessments are reported. There are no negative words restricting this construction, for the language is this: "And

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any such remonstrance shall be verified by affidavit and may be for any or all of the following causes."

In our opinion the court erred in sustaining the appellees' motion to reject the remonstrances.

Judgment reversed.

Filed April 30, 1885.

No. 10,438.

WHEELER v. HAWKINS, ASSIGNEE, ET AL.

PLEADING.—Parol Promise.—Cause of Action.—Sufficiency of Complaint.—Demurrer.—In declaring upon a parol promise to pay or repay money upon the happening of a certain event, the complaint is bad upon demurrer for the want of sufficient facts, unless it be averred therein that such event has happened, as it will fail to state an existing cause of action.

SAME.—Consideration.—So, also, in declaring upon such parol promise, the complaint is insufficient on demurrer, if it fail to show that the promise sued on is supported by a sufficient legal consideration.

SAME.—Voluntary Assignment for Benefit of Creditors.—Trust Estate.—Suit by Assignee.—Exhibit.—In a suit by an assignee in a voluntary assignment for the benefit of creditors, for the recovery of a part of the trust estate, he must allege that the deed of assignment to him has been duly recorded in the recorder's office of the proper county, and must file a copy of such deed as an exhibit; otherwise his complaint must be held bad on demurrer for the want of sufficient facts.

From the Marshall Circuit Court.

W. B. Hess, for appellant.

A. C. Capron, for appellees.

Howk, J.—The first error of which complaint is here made by the appellant, Wheeler, is the overruling of his demurrer to the complaint of the appellee, Hawkins, assignee in the voluntary assignment of one Thomas Shakes.

This complaint was filed in the court below on the second day of April, 1877, and therein the appellee, Hawkins, as sole plaintiff, alleged that on the eleventh day of February, 1874, he was appointed assignee of one Thomas Shakes, a failing debtor in Marshall county; that he took possession of

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the assets of Shakes, consisting of a large amount of notes and accounts, a broken stock of merchandise, and one hundred and sixty acres of land, upon which there was due the appellant, Wheeler, for a balance of purchase-money, about three thousand dollars; that claims to the amount of, to wit, \$5,000, were filed against the assignor's estate, besides the appellant's claim; that after appellee took possession of such assets he converted them into money as rapidly as he could, and the entire amount so realized from the personal property was about \$1,500; that thereupon, after various consultations with some of the creditors, it was thought expedient to pay the first instalment due on appellant's mortgage and prevent a sale thereunder, and for the appellee to procure an order of sale and endeavor to sell the real estate; and this was believed to be the only feasible way to obtain a reasonable amount of assets, and the best dividends for the creditors; that, acting under this belief, the appellee, on the 25th day of August, 1874, paid the appellant the sum of \$941.15, the principal and interest then due, and the foreclosure was delayed in order that appellee might obtain from the proper court an order sanctioning such payment, and an order for the sale of such land, which orders it was then believed the court would make; that it was the understanding and agreement between the appellee and the appellant, that, if the court would not so authorize such payment, the money was to be repaid to appellee by the appellant; that such payment was so made by appellee with the understanding and belief that the court would authorize him to pay the money, and that the creditors would also consent thereto.

But the appellee averred, that, after he had made such payment, he procured an order for the sale of such land, and reported to the court his action in the payment of such money to the appellant, and asked the confirmation thereof, which report and request were resisted by some of the creditors, and his action had not been confirmed, and he believed it would finally be disapproved by the court and repudiated by the

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creditors; that, in all his actions relating to his assignor's estate, and particularly in the payment of such money to the appellant, the appellee had acted in good faith, and, as he believed, for the interest of the creditors, and unless such money should be refunded to him by the appellant he would be entirely remediless, and be compelled to lose the sum so paid, which was trust money belonging to his assignor's estate, and known to be such by the appellant; and that the appellant refused, although often requested, to repay such money to the appellee. Wherefore, etc.

The first objection to the sufficiency of the complaint, urged in argument by the appellant's counsel, is that it fails to show an existing cause of action in favor of the appellee and against the appellant at the time the suit was commenced. This objection to the complaint, it seems to us, is well taken. The complaint counts upon an alleged parol agreement between the appellee and the appellant to the effect that, in consideration of the payment by appellee to the appellant of the amount then due the latter from the assignor of the former, the appellant would, if the proper court should not authorize such payment, repay such amount of money to the appellee. It was not alleged in the complaint that the money paid the appellant by the appellee, and for the recovery of which this action is prosecuted by the appellee, was not justly due at the time of such payment by his assignor to the appellant; indeed, the contrary was clearly shown by all the averments of the complaint. But the alleged parol agreement of the appellant, that he would repay the amount of such payment to the appellee in a certain event, is the only foundation for the present action. Do the averments of the complaint sufficiently show the happening of such event before the commencement of this action? If they do not, it is certain, we think, that the action was prematurely brought, because the complaint would fail to show an existing cause of action upon such parol agreement at the time the suit was commenced.

The appellee did not allege, in counting upon the agree-

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ment of the appellant, as averred, that if the court should not authorize or confirm the payment, he would repay the amount of such payment to the appellee, that the court would not or did not authorize or confirm such payment to the appellant, or that the court had disapproved, or had refused to approve and confirm, the appellee's report of the payment so made to the appellant. Such an averment was necessary for the purpose of showing that at the time the appellee commenced this suit he had an existing cause of action against the appellant for the enforcement of his alleged parol agreement to repay the money, for the recovery of which he sued. Upon this point the only allegation of the complaint, after stating that appellee had reported his payment to the appellant to the court, is that "the same has not been yet confirmed, and he believes the same will be finally rejected by the court." This allegation was not sufficient, we think, to show that the appellee had an existing cause of action against the appellant, upon his alleged parol agreement at the time of the commencement of this suit thereon.

Another objection to the sufficiency of the complaint, urged by the appellant's counsel, is that the alleged parol agreement of the appellant, declared upon by appellee, is not shown to have been made upon any sufficient legal consideration, and is at most a mere *nudum pactum*. We are of opinion that this objection to the sufficiency of appellee's complaint is well taken and should be sustained. A parol promise to pay or repay money, upon the happening of a specified event, does not of itself import a consideration, and therefore it is necessary, in declaring upon such a promise, to allege a sufficient legal consideration therefor. This was the common law rule, and it is the rule in this State as to promises which are not in writing. "The consideration must either appear impliedly from the instrument itself, as a promissory note or bill of exchange, or the complaint must expressly state the particular consideration on which the contract is founded. And it is essential that the consideration stated should be

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legally sufficient to support the promise for the breach of which the action is brought." Where, as in this case, the action is founded upon a parol or oral promise, it is necessary that the consideration of such promise should be stated with such particularity as will enable the court to decide whether or not the promise sued upon is supported by a sufficient legal consideration. *Brush v. Raney*, 34 Ind. 416; *Leach v. Rhodes*, 49 Ind. 291; *Durland v. Pitcairn*, 51 Ind. 426. In the case in hand, the complaint not only fails to state any sufficient legal consideration for the alleged "understanding and agreement," upon which the action is founded, but it seems to us that the facts alleged show with reasonable certainty that the appellant's promise to repay the money, for the recovery of which this suit was brought, was not supported by any such consideration. It was shown by the complaint that the money paid to the appellant was, at the time of the payment, due him from the appellee's assignor, and was the money of such assignor. For aught that appears to the contrary in the complaint, the money so paid was not only due the appellant from the assignor, at the time of such payment, but, as it was the assignor's money, it was properly paid to the appellant upon the debt then due him from such assignor. Therefore, we are justified, we think, in holding as we do, that upon the showing made in appellee's complaint the appellant's alleged oral promise to repay such money upon the happening of the event specified, is a mere *nudum pactum*, and affords no sufficient ground for appellee's action.

Still another objection to the sufficiency of appellee's complaint is insisted upon in argument by the appellant's counsel. The appellee has sued, in this action, in his representative character of assignee in the voluntary assignment of Thomas Shakes, a failing debtor in Marshall county, to recover an amount of money which he claims in his complaint belongs to the trust estate of his assignor, Shakes. He has nowhere alleged in his complaint that the deed of assignment to him from Shakes has ever been recorded in the recorder's

Clark v. Deutsch.

office of the proper county, nor has he in any manner made a copy of such deed a part of his complaint. It is claimed by the appellant's counsel that for the want of such an allegation and such copy of the deed of assignment, the appellee's complaint was bad on the demurrer thereto. This objection to the complaint is well taken, under the decisions of this court, and must be sustained. *Ross v. Boswell*, 60 Ind. 235; *Foster v. Brown*, 65 Ind. 234; *State, ex rel., v. Krug*, 82 Ind. 58.

For the reasons given, we are of opinion that the appellee's complaint does not state a cause of action against the appellant, and that his demurrer thereto ought to have been sustained. This conclusion renders it unnecessary for us to consider now the numerous other errors assigned by the appellant, some of which seem to us to have been well assigned.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrer to the complaint, etc.

Filed April 23, 1885.

No. 11,885.

CLARK v. DEUTSCH.

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PRACTICE.—Special Finding.—Request for.—Presumption.—Where there is a special finding in the record, and the record shows that the finding was made upon the request of one of the parties, the Supreme Court will presume that the request was properly and seasonably made, unless the record affirmatively shows the contrary.

SAME.—Entry of General and Special Finding.—Where there is one entry, and the whole finding is therein set forth, there is no substantial error in prefacing the special finding by a general finding.

DECEDENTS' ESTATES.—Creditors.—Widow.—Sale of Real Estate.—Creditors have no right to an order for the sale of the widow's interest in the lands of her deceased husband to pay debts due from his estate.

SAME.—Jurisdiction.—Order of Sale.—An order, directing the sale of the widow's interest in the lands of her deceased husband to pay the debts due from his estate, is beyond the power of the jurisdiction of the court, and is void.

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MORTGAGE.—*Descents.*—*Widow.*—The mortgage of a widow on lands acquired from her deceased husband will convey a lien on her interest therein.

From the Pulaski Circuit Court.

J. C. Nye and *J. Nye*, for appellant.

G. Burson and *H. Burns*, for appellee.

ELLIOTT, J.—The appellee presents two questions of practice which require attention before considering the other questions in the case.

The first question is settled against him by the cases of *Trentman v. Eldridge*, 98 Ind. 525, and *Western Union Tel. Co. v. Trissal*, 98 Ind. 566. These cases decide that where there is a special finding in the record, and the record shows that it was made upon request of one of the parties, the court will presume that the request was properly and seasonably made, unless the record affirmatively shows the contrary.

The special finding in this case is preceded by what appears to be a general finding, but this finding forms part of the same entry as that in which the special finding is incorporated, and we think that it can not be regarded as an independent general finding. It is, in truth, a mere preface to the special finding. The entry is a clumsy one, but, as the proceeding was an entire and indivisible one, there exists no just reason for depriving the appellant of the benefit of the special finding. The whole proceeding is embodied in one entry, and took place at the same time, and no substantial error was committed in prefacing the special finding by the general one; at all events, the court could not, by such a procedure, take from the appellant the rights resulting from his exceptions to the conclusions of law. We need not inquire what the rule would be, if there had been an independent general finding, preceding the special by a considerable interval of time, for here there was no interval at all; there was really but one finding and one entry. *Smock v. Harrison*, 74 Ind. 348, *vide* p. 355.

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The material facts embodied in the special finding are these: Hardy Stephens died the owner of the land in controversy, and also the owner of other lands. He died intestate, leaving no children, but leaving Elizabeth Stephens, his widow, and Obadiah Stephens, his father, as his only heirs. Very soon after the death of Hardy his father died, leaving as his heirs his children Obadiah, Anna and Sarah. The widow purchased their interest in the land, and executed to them her notes and mortgage, of which the appellant became the owner by assignment. In October, 1879, appellant secured a decree of foreclosure on which sale was made, and a deed finally executed to him by the sheriff in April, 1881. In May, 1880, the children of Obadiah Stephens executed a quit-claim deed to Clark. The deed to Elizabeth Stephens was executed by an agent acting under a power of attorney in which two of the persons by whom it was executed were married women, and in the execution of which their husbands did not join, and the second deed was perhaps executed to remedy this defective execution of the first. William Spangler was duly appointed administrator of the estate of Hardy Stephens, and in March, 1880, George Burson, as one of the creditors of the estate, filed his petition in the Pulaski Circuit Court, making William Spangler, administrator, and the widow, Elizabeth Stephens, parties, and praying that the administrator be directed to sell the land to pay the debts of the intestate. The prayer of the petition was granted after due notice, and, in due form of law, the land was sold prior to October, 1881, and the deed confirmed. Appellee was the purchaser of the land at the administrator's sale, and paid therefor eight hundred dollars, took possession of the land, and soon after married Elizabeth Stephens, who died July 9, 1879.

We have given only a brief synopsis of the facts stated in the special finding, but it is full enough to show the general features of the case. It is quite clear that the trial court erred in pronouncing the law against the appellant as to the

Clark v. Deutsch.

whole of the land in controversy. The creditors of the husband had no right to an order for the sale of the widow's interest in the land, and it was beyond the power of the jurisdiction of the court to grant such an order. It is too firmly settled to admit of debate, that the widow's interest in the lands of her deceased husband can not be ordered sold for the payment of the debts of the husband. *Pepper v. Zahnsinger*, 94 Ind. 88; *Nutter v. Hawkins*, 93 Ind. 260; *Matthews v. Pate*, 93 Ind. 443; *Flenner v. Travellers Ins. Co.*, 89 Ind. 164; *Flenner v. Benson*, 89 Ind. 108; *Compton v. Pruitt*, 88 Ind. 171; *Hendrix v. McBeth*, 87 Ind. 287; *Armstrong v. Cavitt*, 78 Ind. 476, 482; *Elliott v. Frakes*, 71 Ind. 412.

The administrator's sale and deed certainly did not convey to the appellee the interest of Elizabeth Stephens as widow, although it did, perhaps, convey the interest she acquired by purchase from the children of her deceased husband's father, for where a party purchases from the heirs of a deceased person other than the widow, he takes the land subject to the rights of the creditors of the decedent. The interest vested in her as widow was conveyed to the appellant by the sale made upon the foreclosure of the mortgage, and as to that interest he undoubtedly has the paramount right. The mortgage executed by her covered the entire property, and as her interest as widow was not subject to her husband's debts, the mortgage, as to that interest, was clearly effective, however it may be as to the interest bought of the heirs of the father of her deceased husband.

We think it will secure a more satisfactory result to remand the case for a new trial than to direct judgment on the special finding, and we accordingly reverse the judgment, with instructions to sustain appellant's motion for a new trial.

Filed April 29, 1885.

Seivers v. Dickover *et al.*

No. 11,844.

SEIVERS v. DICKOVER ET AL.

FRAUD.—*Transfer of Property by Failing Debtor.*—*Attachment.*—*Replevin.*—*Possession.*—Where a fraudulent transfer of personal property by a failing debtor is made the ground of attachment proceedings by creditors, and such ground is sustained, such attaching creditors are entitled to possession of such property as against the debtor and his vendee.

SAME.—*Judgment for Value.*—A judgment in favor of the attachment plaintiffs for the value of the property, in case a return can not be had, is authorized by the statute.

SAME.—*Rights of Fraudulent Vendee.*—The fraudulent vendee of a failing debtor is not entitled to receive, out of the property, money paid by him in such transaction, even where it has gone to *bona fide* creditors, as the law will leave parties who have been convicted of fraud where it finds them.

From the Laporte Circuit Court.

T. J. Merrifield and J. E. Cass, for appellant.

A. L. Jones, F. P. Jones and W. Johnston, for appellees.

ZOLLARS, C. J.—The evidence establishes, or at least tends to establish, the following state of facts: On and prior to the 17th day of August, 1881, Thomas Garland was the owner of a stock of boots and shoes, book accounts, etc., of the value of \$2,880. At that time he was indebted to appellees, except Dickover, much in excess of the value of the goods and accounts, and had no other property. On that day, for the purpose of defrauding his creditors, some of whom were the appellees, except Dickover, he sold and transferred the goods and accounts to appellant for \$1,000. Appellant became the purchaser with full knowledge of the fraudulent purpose of Garland, and with the intent on his part to further the end in view by Garland. As a part of the purchase-money, appellant paid a judgment against Garland, and a note that Garland owed a bank. Appellant was liable for the judgment, by reason of being on an appeal bond with Garland. The bank had taken out a writ of attachment against Garland, and it was in the hands of the sheriff before the transfer to appellant was completed. Appellant, having

101	495
138	138
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paid the note, no levy was made. This bank note and the judgment amounted to \$658. The balance of the agreed price of \$1,000 appellant paid to Garland. On the day following the transfer, appellees, except Dickover, brought a suit in attachment against Garland, on the ground that the transfer to appellant was fraudulent and void as against them. To this suit appellant was made a party defendant. The goods were seized under the writ and taken possession of by appellee Dickover, as sheriff, as the goods of Garland. Subsequent to this, appellant instituted a suit in replevin against the sheriff and the other appellees, and upon a proper affidavit under section 1267, R. S. 1881, the stock of goods was delivered to him. By agreement of the parties, these two cases were both submitted to the court at the same time and tried upon the same evidence. The court found for appellees, and that appellant is not entitled to the possession of the goods, as owner or otherwise, as against appellees; that appellees are entitled to the possession, and that the goods are of the value of \$2,880. Over a motion for a new trial, a judgment was rendered for a return of the goods to appellees, and, in case a return can not be had, that appellees recover from appellant the sum of \$2,880. On the day following the rendition of the judgment, appellant moved for a modification and reduction of it, by an allowance to him, as a credit, of the amount that he had paid on the Garland note to the bank, and on the judgment against Garland. This motion was overruled and he excepted. His contention here is that this motion should have been sustained, even though the transaction between him and Garland may have been fraudulent, as the amount thus paid went to *bona fide* creditors of Garland; and, as we understand the argument, that although appellant may not have established his right to the possession of the property, appellees also failed to establish their right to the possession, and that, therefore, there should have been no judgment for the return of the property to them, nor judgment for the value thereof, in case a return

could not be had. The ground of attachment having been sustained, the appellees were entitled to the possession of the goods as against Garland and appellant. Had the attachment suit been tried separately, and a finding made and judgment rendered in favor of appellees, the goods would have been ordered sold. Such a judgment and order would have been conclusive as against appellant, who was a party to that suit.

In the finding and judgment in the case as tried, is necessarily included a finding that the attachment was well laid. The burden was upon appellant. He could recover, if at all, only upon the strength of his own title. He could recover only by showing that his purchase from Garland was *bona fide*, and for value, and that hence the attachment by the creditors was not well laid. This the court below found he failed to do. We can not disturb that finding.

There is nothing erroneous in the judgment in favor of appellees for the value of the property in case a return to appellees can not be had. Such a judgment is authorized by the statute. R. S. 1881, section 572; *Thompson v. Eagleton*, 33 Ind. 300; *Bales v. Scott*, 26 Ind. 202.

It is difficult to perceive upon what substantial ground credit could be given to appellant for the amount of the purchase-money which he paid on Garland's note to the bank and on the judgment against Garland. If the transaction between appellant and Garland was not fraudulent as against appellees, the finding and judgment should have been for him, as the owner of the goods. If, on the other hand, the transaction was void or voidable as against appellees, it was because it was fraudulent as to them. To allow appellant, out of the property, what he thus paid would be to adjudge his transaction thus far an honest one, and thus make the sale to him void in part and valid in part.

A failing debtor may prefer creditors if it be honestly done, but this is not that kind of a case. Appellant doubtless paid

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the judgment because he was liable for it. The payment of the note to the bank was a necessity to the sale. If it had not been paid, the goods would have been taken under the bank's attachment. To protect any of Garland's creditors was no part of the purpose of the sale to appellant; the purpose of the sale was to defeat the creditors.

The loss of the amount paid by a fraudulent grantee is the penalty that the law inflicts for the fraudulent transaction. To refund to such a grantee the amount he has paid would be to destroy the penalty. Such a holding would destroy the salutary restraints which the law has built up against such transactions, by removing all danger of loss. When once a party has been convicted of fraud, the law refuses its aid to him in any manner or form, and leaves him, as to that transaction, just where it finds him. *Bump Fraud. Conv.* (3d ed.), pp. 486 and 614.

The judgment is affirmed, with costs.

Filed April 25, 1885.

No. 12,056.

HARRIS v. HARRIS.

HUSBAND AND WIFE.—*Desertion of Wife.*—*Complaint for Support.*—*Defect Cured by Verdict.*—A complaint by a wife against her husband to obtain provision for her support, under sections 5132 and 5133, R. S. 1881, which fails to allege that the desertion was without cause, is cured by verdict.

From the Gibson Circuit Court.

C. A. Buskirk, for appellant.

J. E. McCullough, *S. M. Holcomb* and *J. H. Miller*, for appellee.

BEST, C.—The appellee brought this action against the appellant, her husband, to obtain provision for the support of herself and her unborn child, under the provisions of sections 5132 and 5133, R. S. 1881.

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The first named section provides that such support may be obtained "where the husband shall have deserted his wife, or his wife and children, without cause, not leaving her or them sufficient provision for her or their support," and the complaint alleged that appellant had deserted the appellee, his wife, without leaving any provision for her support.

An issue was formed, a trial had, and judgment was rendered for \$400. A motion in arrest of judgment was overruled, and this ruling is assigned as error.

This motion attacks the complaint. It is insisted that as the complaint fails to aver that the alleged desertion was without cause, it was insufficient, and the motion should therefore have been sustained. We think otherwise. This attack upon the complaint comes after verdict, and, therefore, comes too late. The defect was thereby cured. After verdict, the most liberal intendment will prevail, and the defective averment will thus be cured. Where it is necessary to prove a fact upon the trial, and the complaint omits to aver it, the defect is cured by the verdict if the general terms of the declaration are sufficient to comprehend it. *Peck v. Martin*, 17 Ind. 115.

It was necessary to offer some evidence that the act of desertion was without cause, but as this merely fixed the quality of the act, and was entirely consistent with the complaint, proof may well have been admitted under the general averment of desertion. *Shimer v. Bronnenburg*, 18 Ind. 363; *Westfall v. Stark*, 24 Ind. 377.

The averment that the appellant had deserted the appellee, without making any provision for her support, was an averment of her right to obtain such support upon the ground of desertion under the statute, and though such averment was defective its defect was cured by the verdict. *Alford v. Baker*, 53 Ind. 279; *Parker v. Clayton*, 72 Ind. 307; *Watson v. Crowsore*, 93 Ind. 220.

The motion in arrest was properly overruled, and the judgment should be affirmed.

Caviness v. Rushton, Administrator.

· **PER CURIAM.**—It is therefore ordered, upon the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed April 25, 1885.

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101 500
154 259
154 382

No. 11,780.

CAVINESS v. RUSHTON, ADMINISTRATOR.

PROMISSORY NOTE.—An instrument reading thus: "I promise Emily Caviness to give her two thousand dollars at my death to take care of her children with, which she claims of my estate. She has been in my family nineteen years and a faithful servant, and it is my will to her," is not a promissory note.

CONTRACT.—*Promise to Make Compensation for Services by Will.*—A promise to make a devise to one who has rendered services to the promisor at his request, as a compensation for such services, is a valid promise, for a breach of which an action will lie.

PLEADING.—*Stating Cause of Action in Different Forms.*—A cause of action may be stated in different forms, and unless it clearly appears that the cause of action stated in the several paragraphs is one and the same, requiring the same evidence and no more, it is material error to sustain a demurrer to one of the paragraphs if it is good in itself.

From the Hendricks Circuit Court.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellant.

ELLIOTT, J.—The appellant in the first paragraph of her complaint set forth the following instrument:

"OCTOBER 13, 1882.

"I promise Emily Caviness to give her two thousand dollars at my death to take care of her children with, which she claims of my estate. She has been in my family nineteen years and a faithful servant, and it is my will to her."

And alleged that it was executed by William R. Rushton in his lifetime, and that Rushton died some time after the execution of the instrument, and that the appellee is the administrator of his estate.

We do not think the instrument declared on can be re-

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garded as a promissory note. On its face it appears to be a voluntary promise to make a testamentary disposition of property. It does not appear to be a promise to pay money at a certain time, absolutely and at all events. The words in the first clause of the instrument, *prima facie*, express a promise to make a gift, and the concluding words are indicative of an intention to make a testamentary disposition of property. The contention of appellant that the instrument is a promissory note can not be maintained without doing violence to the language of the instrument. The instruments in *Harmon v. James*, 7 Ind. 263, and *Johnston v. Griest*, 85 Ind. 503, were very similar in their tenor and effect to the one now before us, and it was held that they were not promissory notes. As the first paragraph of the complaint proceeds upon the theory that the instrument is a promissory note, it is bad.

The third paragraph of the complaint alleges that the appellant, at the special instance and request of the appellee's intestate, performed work and labor for him for nineteen years; that "on the 13th day of October, 1882, she had a settlement with William R. Rushton, then in life, for the services by her performed, and the amount found to be due was two thousand dollars, and the said Rushton then agreed to leave her by will the sum so found due her for services, and executed to her a written agreement." The written agreement set forth in this paragraph is the same as that set out in the first paragraph. It is also alleged that Rushton died without a will.

We are unable to perceive any infirmity in this paragraph of the complaint. A promise supported by a valuable consideration is well pleaded, and the case is, therefore, unlike that of a voluntary promise to make a gift. The services were rendered in accordance with a precedent request, and, after they were performed, a settlement was had and their value agreed upon. Not only were all the elements of a valid contract present, but there was a full recognition, by the settlement, of the right to compensation and an agreement as to

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the amount. What the parties have thus agreed upon and adjusted, the courts have no right to disturb. As there was a precedent request to render the services, and as they were rendered upon that request, the case in hand is not within the rule laid down in the cases cited.

The manner in which the intestate promised to make the payment can not deprive the appellant of her right to recover the value of the services rendered by her at his precedent request. The only difference between this case and that of an ordinary promise to pay for services is in the stipulation as to the time and manner of making payment. A promise, founded upon a valuable consideration, to make provision by will, is a valid contract, and an action will lie for its breach. An English author says: "It is well established that a man may validly bind himself or his estate by a contract to make any particular disposition (if in itself lawful) by his own will." Pollock Princ. of Cont., section 308. This is the doctrine of this court. *Bell v. Hewitt*, 24 Ind. 280.

The case in hand is plainly distinguishable from *Moore v. Stephens*, 97 Ind. 271, for here there was a valuable consideration, a precedent request, and an express contract; while in the case cited there was no valid contract, but simply an ineffectual attempt to make a testamentary disposition of property.

It was proper to show the consideration of the intestate's promise, and when it was shown to be a valuable one, yielded upon a precedent request, a cause of action appeared. It was not necessary that the consideration should affirmatively appear in the written instrument; it was sufficient to show that there was a precedent request, and that the services were performed pursuant to this request. These facts make it appear that there was a valid contract, and not a mere voluntary promise to make a testamentary gift. If there had been no consideration for the promise, or if it appeared that the promise was simply to make a gift, then, of course, no action could be maintained.

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The second and third paragraphs are not the same, for the former does not aver that there was a settlement and an amount agreed upon, but is simply a common count for services rendered. It is only where the two paragraphs clearly appear to be founded upon one and the same cause of action, and where the one requires no greater or different evidence than the other, that it is harmless error to sustain a demurrer to one of them, for it has long been the rule of this court that a party may state his cause of action in different forms. *Snyder v. Snyder*, 25 Ind. 399; *Stearns v. Dubois*, 55 Ind. 257.

For the error in sustaining the demurrer to the third paragraph of the complaint the judgment must be reversed.

Filed May 1, 1885.

No. 12,101.

MILLER, ADMINISTRATOR, v. WHITE RIVER SCHOOL
TOWNSHIP.

101 503
1164 604
101 503
1615 42

PLEADING.—*Demurrer to Reply.*—*Surplusage.*—A demurrer to a reply, in substantial compliance with the provisions of section 357, R. S. 1881, is sufficient both in form and substance, and is not rendered defective by the introduction of other matter, which may be properly regarded as surplusage.

SCHOOL CORPORATION.—*Power of Trustee.*—*Certificate of Indebtedness.*—*Cause of Action.*—The trustee of a school corporation has power to contract a debt in the name of and binding upon such corporation, in the purchase of necessary furniture, apparatus and other supplies of its schools, and to execute in the name of his corporation a valid and binding certificate of indebtedness or note for the amount of such debt; and such certificate or note will constitute *prima facie* a good cause of action against such corporation.

SAME.—*Statute Construed.*—Such a certificate or note is not rendered invalid by the trustee's failure to comply with the provisions of sections 6006 and 6007, R. S. 1881, as those sections of the statute have no application to the ordinary debts of a school corporation, incurred by the trustee for the usual and necessary furniture, apparatus and other supplies of its common schools.

PRACTICE.—*Interrogatories to Jury.*—*General Verdict.*—*Duty of Court.*—

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Ordinarily, it is the duty of the trial court, when requested by either party, to instruct the jury, if they render a general verdict, to find specially upon particular questions of fact, in answer to written interrogatories within the scope of the issues, and it is error to refuse such an instruction, or to submit to the jury such interrogatories.

SAME.—Directing Verdict.—Harmless Error.—Where the court, in the discharge of its duty, and without invading the province of the jury, may properly instruct them to return their verdict for either party, the error of the court in refusing to submit interrogatories to the jury, at the request of the other party, is at most a harmless error.

SAME.—Immaterial Issue.—Where the complaint states a good cause of action, and issue is joined upon a special or affirmative paragraph of answer, which states no defence whatever to plaintiff's action, and where the allegations of such paragraph of answer are admitted to be true on the trial, it is error for the court to instruct the jury, upon such immaterial issue, to return a verdict for the defendant.

From the Gibson Circuit Court.

L. C. Embree and W. D. Robinson, for appellant.

J. E. McCullough and J. H. Miller, for appellee.

Howk, J.—This action was brought by the appellant, as the administrator of one John Miller, deceased, against the appellee, upon a certificate of indebtedness, executed by the trustee of White River township, of which certificate the following is a copy:

“STATE OF INDIANA, COUNTY OF GIBSON:

“*Trustee's Office, White River Tp., Nov. 23rd, 1881.*

“This is to certify that there is now due from this township to H. L. Kimberlin & Co., one hundred and seventy-five dollars for part five of the McBride Tellurians bought for the use of this township, and payable out of the special school funds at the People's Bank at Princeton, Indiana, on the 1st day of June, 1883, with interest at eight per cent., and eight per cent. on the amount after maturity till paid.

(Signed) “WILLIAM F. HUDELSON,

“School Trustee of White River Township.”

The appellant alleged in his complaint that before the maturity of such certificate of indebtedness, it was endorsed in

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writing to his decedent, John Miller, by the payees thereof, and that it was past due and wholly unpaid. Wherefore, etc.

The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, the defendant below, and, over the appellant's motion for a new trial, judgment was rendered against him for the appellee's costs.

In this court, the first error assigned by the appellant is that the circuit court erred in sustaining the demurrer to the second and third paragraphs of his reply. In discussing this alleged error, the appellant's counsel do not claim that either the second or third reply stated facts sufficient to constitute a good reply, but they say: "We desire to question the form and sufficiency of the demurrer," and they conclude that it "is insufficient both in form and substance." The demurrer thus called in question reads as follows:

"The defendant demurs separately to the second and third paragraphs of reply, for the reason that neither of said paragraphs states facts sufficient to constitute a reply, or avoidance of the facts stated in the paragraphs of answer to which said paragraphs of reply are respectively plead."

In section 357, R. S. 1881, it is provided as follows: "The defendant may demur to any paragraph of the reply, on the ground that the facts stated therein are not sufficient to avoid the paragraph of answer," etc. It is apparent that the demurrer objected to, in this case, is in substantial compliance with the requirements of the statute, and it is sufficient, we think, "both in form and substance." It is true, perhaps, that there is some surplusage in such demurrer, but it is equally true, as to any pleading, that "surplusage does not vitiate that which is good." *Mires v. Alley*, 51 Ind. 507; *Owen v. Phillips*, 73 Ind. 284; *Morris v. Stern*, 80 Ind. 227.

The only other error assigned by appellant is the overruling of his motion for a new trial. Under this error, the first question discussed by his counsel is thus stated in their brief: "Did the lower court err in refusing to submit to the jury the interrogatories propounded by appellant?" Before

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considering this question, it is proper that we should state, more fully than we have done, the issues in the cause which were submitted to the jury for trial. We have already stated the appellant's cause of action.

The appellee originally answered in four special or affirmative paragraphs. In the first paragraph, it was alleged that the written instrument sued upon was made and executed without any consideration whatever therefor.

In the second paragraph of its answer, the appellee alleged that, on the 23d day of November, 1881, H. L. Kimberlin & Co. agreed and contracted with appellee to deliver to it, within a reasonable time after that date, five of McBride's Tellurians; that the written instrument sued upon was executed in part consideration of such contract, and upon no other consideration whatever; and that H. L. Kimberlin & Co. wholly failed and neglected to deliver such Tellurians or any of them, to the appellee within such reasonable time, or to deliver them at all; wherefore the consideration of such written instrument had wholly failed.

In the third paragraph of answer, after stating the consideration of the written instrument sued upon substantially as the same was stated in the preceding paragraph, it was alleged that the Tellurians were to be delivered to appellee by H. L. Kimberlin & Co., within, to wit, three months from the date of the contract; that H. L. Kimberlin & Co. wholly failed and neglected to deliver to the appellee such Tellurians, within such time; that thereupon appellee elected to rescind such contract and so notified H. L. Kimberlin & Co., and that the Tellurians had not, nor had either of them ever been delivered by H. L. Kimberlin & Co. or by any one in their behalf, or been accepted or received by the appellee.

In the fourth paragraph of answer, the consideration of the written instrument sued upon is stated substantially as it was stated in the second paragraph; and it was then averred that at the time of making such contract, and of executing such instrument, there was an outstanding indebtedness against the

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appellee, and chargeable against its special school fund, in the amount of \$6,000, and greatly exceeding in, to wit, the sum of \$4,500, the aggregate amount then on hand belonging to such fund, together with the amount to be derived from the tax assessed against such township for that year in favor of such fund; and that such contract was made with H. L. Kimberlin & Co., and such indebtedness to them was attempted to be contracted by such trustee, without his having procured any order from the board of commissioners of Gibson county authorizing such trustee to contract any such indebtedness, or without his having presented any petition to such board for such an order or having given notice of any such petition.

Upon the foregoing paragraphs of answer the appellant joined issue by his reply in general denial.

Afterwards the appellee filed its fifth paragraph of answer, verified by the oath of its then trustee, wherein it was averred that the written instrument sued upon was never executed by the appellee, nor by its trustee, nor by any other person authorized to execute the same on its behalf; and that at the time William F. Hudelson signed such instrument, if at all, he was not the trustee of such appellee.

With this statement of the issues in the cause, we come now to the consideration of the first question presented by the appellant's counsel in argument, under the alleged error of the court in overruling the motion for a new trial, namely: Did the court err in refusing to submit to the jury the appellant's interrogatories? The record shows that, at the proper time, the appellant submitted to the court a number of written interrogatories, and requested the court to instruct the jury to answer the same and to find specially upon the several questions of fact stated therein, in case they should return a general verdict; that the court refused to submit such interrogatories to the jury and to instruct them, as requested; and that to this action and ruling of the court the appellant at the time excepted. We need not set out these interrogatories;

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it will suffice to say that they seem to us to have been within the scope of the issues in the cause. No objection was made below, and none is made here, to either the form or substance of the interrogatories. In section 546, R. S. 1881, it is provided that in all cases, when requested by either party, the court shall instruct the jury, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing. In *Campbell v. Frankem*, 65 Ind. 591, the court said: "It is the right of a party to have the jury find upon facts which fall within the scope of the issues in the case. * * * The court may control the form of interrogatories, and judge of their propriety, but, when properly asked for, it is error to reject them."

In discussing the question we are now considering, the appellee's learned counsel do not claim, as we understand their argument, that the appellant's interrogatories to the jury were defective either in form or substance, or that they were not within the scope of the issues in the case. Counsel say that the appellant was not injured by the court's refusal to submit his interrogatories to the jury, because the court instructed the jury that "under the issues, evidence and admissions in the case, it is the duty of the jury to find for the defendant," unless this court should be of the opinion that such instruction was erroneous. In other words, the appellee's counsel virtually concede that the trial court erred in its refusal to submit the appellant's interrogatories to the jury, unless the case was one in which the court, without invading the province of the jury, and simply in the discharge of its own duty, had properly instructed them to return their verdict for the appellee. If the court's instruction above quoted was right and properly given, then the error of the court, if such it were, in refusing to submit the appellant's interrogatories to the jury, was at most a harmless error; and for such an error this court will not reverse a judgment.

This view of the question under consideration seems to us to be the correct one, and it is in harmony with the decision

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of this court in *McClaren v. Indianapolis, etc., R. R. Co.*, 83 Ind. 319. In that case the court said: "Where the interrogatories are entirely unnecessary, as where, under the evidence, there is no cause of action, and the court is, therefore, authorized to direct a verdict for the defendant, there the withdrawal of the interrogatories, which, in such a case, should not have been submitted to the jury, is not error." So that the proper decision of the question we are now considering depends upon the answer which must be given to this further question, namely, Did the trial court err in instructing the jury that, "under the issues, evidence and admissions in the case, it is the duty of the jury to find for the defendant?"

Of course, there are cases in which the trial court, of its own motion and without any invasion of the province of the jury, may properly instruct the jury to return their verdict for the one or the other party. *Dodge v. Gaylord*, 53 Ind. 365; *Moss v. Witness Printing Co.*, 64 Ind. 125; *American Ins. Co. v. Butler*, 70 Ind. 1. Where issue is joined on the plaintiff's complaint by an answer in general denial merely, and evidence is introduced which tends to sustain the material averments of the complaint, it would certainly be error for the court to direct a verdict for the defendant; for, in such case, the sufficiency or insufficiency of the evidence is a question for the jury, and the plaintiff has the right to claim a verdict, either for or against him, uninfluenced by the court's opinion in relation to the evidence. *Adams v. Kennedy*, 90 Ind. 318. In the case in hand, however, all the paragraphs of appellee's answer, except the fifth, which is not sustained by any evidence, were special paragraphs wherein the appellee pleaded affirmative facts in bar of the action. To these special or affirmative paragraphs, the appellant replied by a general denial, and as to each of them the appellee, of course, had the burthen of the issue. If a special or affirmative paragraph of answer states a good defence, in bar of the action, and is sustained by sufficient legal evidence, without any conflict

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therein, we think the court may properly instruct the jury to return a verdict for the defendant without any invasion of the province of the jury, even though the plaintiff's evidence may have made a *prima facie* case in his behalf. But where issue is joined upon a special or affirmative paragraph of answer which states no defence whatever to plaintiff's action, and would have been held bad on demurrer, then, although upon the trial the facts stated in such paragraph are proved to be true by an abundance of uncontradicted evidence, it would be error for the court to instruct the jury, upon such issue, to return a verdict for the defendant. This is settled, we think, by the decisions of this court. *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Dorman v. State*, 56 Ind. 454; *McCloskey v. Indianapolis, etc., Union*, 67 Ind. 86 (33 Am. R. 76).

In the case in hand, it is claimed on behalf of the appellee that the fourth paragraph of its answer, the substance of which we have already given, stated a good defence in bar of the appellant's action, and that it was abundantly sustained, without contradiction, by the admissions of the appellant as evidence on the trial. We are of opinion, however, that the fourth paragraph of answer stated no defence whatever to the appellant's action. It is manifest that the paragraph was prepared upon the supposition of the pleader that the contract for the Tellurians, mentioned in the complaint, was void because the appellee's trustee had not complied with the provisions of sections 6006 and 6007, R. S. 1881, before making such contract. We think, however, that those sections of the statute can have no application to the ordinary debts incurred by the trustee for furniture, apparatus and other supplies for the schools of his township, such as the debt in suit for the Tellurians. Besides, the sections of the statute did not enlarge, but were intended to limit, the power of the trustee to contract debts in the name of and binding upon his township. This is shown by the phraseology of the sections, and by the title of the act from which

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the sections are taken. The title of such act is, "An act to limit the power of township trustees in incurring debts," etc. Acts 1875, Reg. Sess., p. 162.

This court has repeatedly held that notes executed by a township trustee for borrowed money did not evidence debts of the township, unless it was shown that the money borrowed had been used for the legitimate purposes of the township. *Wallis v. Johnson School Tp.*, 75 Ind. 368; *Pine Civil Tp. v. Huber, etc., Co.*, 83 Ind. 121; *Reeve School Tp. v. Dodson*, 98 Ind. 497.

If, therefore, it were conceded that the fourth paragraph of answer stated a good defence to this action, we would be bound to hold that it was not sustained by sufficient evidence. For, while it was shown by the appellant's admissions on the trial, that certain notes had been executed by the trustee, Hudelson, for borrowed money, which notes were yet unpaid, still it was not shown in any manner by the appellee, who had the burden of the issue, that the money so borrowed had been used for the township. It is clear, therefore, that, under the decisions of this court, the appellee failed to show the existing outstanding indebtedness of the township, alleged in its fourth paragraph of answer.

Our conclusion is that the court erred in instructing the jury to return a verdict for the appellee, and in refusing to submit appellant's interrogatories to the jury trying the cause.

Other questions are discussed by counsel, but as they may not arise on a new trial of the case, we need not now consider them. Appellee's counsel suggest, in argument, that the complaint is bad, and that, for this cause, the judgment below should be affirmed. The sufficiency of the complaint was not called in question below, nor is it questioned here by any assignment of error or cross error. Therefore, the question suggested is not presented for our decision. Besides, the evidence in the record fully supplied or tended to supply any defect in the complaint, as the question is now presented.

For the reasons heretofore given, we are of opinion that

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the court erred in overruling the appellant's motion for a new trial.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Filed April 25, 1885.

 No. 11,121.

HEATH v. THE STATE.

CRIMINAL LAW.—Larceny.—Indictment.—The charging part of an indictment reads thus: "Jonathan W. Heath, late of said county, on the 13th of August, 1880, at the county and State aforesaid, did then and there, two head of cattle, commonly called steers, of the value of sixteen dollars each, of the goods and chattels of William Osborn, then and there being found, did feloniously steal, take and drive away."

Held, that, although inartistically drawn, the indictment was sufficient.

SAME.—Failure to Record Indictment.—The failure of the clerk to enter the indictment in the order-book can not be made the ground of a motion to quash.

SAME.—Return of Indictment.—A recital in the record, that the grand jury come into open court and present an indictment, followed by an indictment, is sufficient to show its due return.

SAME.—Exceptions.—Bill of Exceptions.—A defendant who flees to escape judgment, and remains out of the jurisdiction of the court for two years, can not have exceptions entered, nor can he secure a bill of exceptions after such a lapse of time.

From the Starke Circuit Court.

H. R. Robbins and *A. L. Jones*, for appellant.

F. T. Hord, Attorney General, *G. W. Beeman*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ELLIOTT, J.—The charging part of the indictment reads as follows: "Jonathan W. Heath, late of said county, on the 13th day of August, 1880, at the county and State aforesaid, did then and there, two head of cattle, commonly called steers,

101	512
144	252

101	512
167	153

101	512
168	93

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of the value of sixteen dollars each, of the goods and chattels of William Osborn, then and there being found, did feloniously steal, take and drive away." We perceive no substantial infirmity in this indictment, although it is not very cleverly drawn. There is a repetition of the verb *did*, and a departure from the usual arrangement of words, by placing the object after the auxiliary verb, but there is neither uncertainty in the averments nor lack of substantive facts in the statements of the pleading.

The failure of the clerk to enter the indictment in the order-book can not be made the ground of a motion to quash.

The omission of the clerk to record the indictment in the order-book did the appellant no injury, and supplies him with no valid ground for a reversal.

A recital in the record, that the grand jury come into open court and present an indictment, followed by an indictment, is sufficient to show its due return. *Mathis v. State*, 94 Ind. 562.

The verdict against the appellant was returned on the 18th day of October, 1882. The appellant's counsel state in their brief, that "after the verdict was rendered, and before judgment was pronounced, the defendant fled and made default on his bond, but was re-arrested in July, 1884, and brought before the court at its next session, to wit, the October term, 1884, when he filed his motion for a new trial." It is doubtful whether a defendant who flees, and remains beyond the jurisdiction of the court for two years, has a right to file a motion for a new trial, for to tolerate such a practice would put the State at great disadvantage, and open the door to flagrant abuses. *Sargent v. State*, 96 Ind. 63. But, granting that he may file such a motion, we think that he can not at so late a day secure any valid exceptions to the rulings on the trial, and can take no effective bill of exceptions. The statute provides that "Exceptions must be taken at the time of the trial." R. S. 1881, section 1847. It seems clear that

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where the defendant voluntarily absents himself for two years after the return of the verdict, he can not be heard to say that he reserved exceptions at the time rulings upon the trial were made. But, if he could do this, he could not obtain a bill of exceptions, for the statute provides that "All bills of exceptions, in a criminal prosecution, must be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding sixty days from the time judgment is rendered." R. S. 1881, section 1847. We think that the leave must be obtained at the term at which the verdict is rendered, unless the act of the court carries the case over to another term; at all events, that the leave can not be secured by the defendant after the lapse of two years occasioned by his own flight. In *Calvert v. State*, 91 Ind. 473, cited by appellant's counsel, we said: "It is, of course, essential that leave to file should be granted during the term at which the trial is had."

An accused may waive his constitutional right to be present at the trial by fleeing from the process of the court. This subject is discussed in an article on "Waiver of Constitutional Rights in Criminal Cases," in a recent number of the Criminal Law Magazine, where many authorities are collected. 6 Crim. Law Mag. 182, *vide* auth. n. 186. *McCorkle v. State*, 14 Ind. 39. If the defendant may waive a constitutional right by absconding, he certainly does waive a statutory right by such an act.

Judgment affirmed.

Filed March 14, 1885; petition for a rehearing overruled April 29, 1885.

101	514
131	229
101	514
137	620

 No. 8633.

SAVAGE v. LEE ET AL.

PAROL PARTITION.—*Possession.*—*Statute of Frauds.*—In this State a parol partition of real estate, consummated by possession, is binding; and an agreement for partition of lands is not within the statute of frauds.

Savage v. Lee *et al.*

SAME.—*All Cotenants Must be Affected.*—There can not be said to be a voluntary partition, or an agreement therefor, unless by the agreement of all the cotenants of the property, there is, or there is to be, a severance of the interest of one or more of the cotenants in at least some part of such property. No arrangement between tenants in common can result in a partition, unless it operate upon and affect the interests of all the tenants in some part of the common estate.

SAME.—*Agreement between Part of Cotenants.*—Where certain real estate was owned by four persons as tenants in common, and there was a transaction between three of them, such that, if they had been the only tenants, there would have been a partition, or an agreement for a partition, of the whole common estate between such three, a certain portion to one in severalty, and the remainder to the other two jointly, the fourth tenant still holding his interest in both such tracts,

Held, that this could not be regarded either as a partition or an agreement therefor.

STATUTE OF FRAUDS.—*Agreement between Cotenants for Exchange of Interests.*

—Where real estate is owned by more than two tenants in common, an oral agreement between two of such tenants to exchange with each other their undivided interests in definite portions of the common estate, is within the statute of frauds; but it is not necessary, in order to withdraw such a contract from the operation of the statute, that there should be the same character of taking possession as in the case of an ordinary parol agreement for the sale of land; and where, in such a case, in pursuance of the agreement, one of the parties thereto conveyed by deed his interest in a definite portion of the common property, and the grantee took possession of such portion, exclusive of such grantor, who took possession of another portion of the common property, exclusive of the other party to the agreement, and made lasting and valuable improvements thereon, and there was mutual acquiescence in such change of possession for fourteen years;

Held, that there was sufficient part performance to take the contract out of the operation of the statute.

SAME.—*Right to Interpose Statute is Personal.*—Only a party to the contract, or his privies or representatives, can repudiate it by interposing the statute of frauds.

From the Wayne Superior Court.

T. J. Study and *C. H. Burchenal*, for appellant.

A. L. Study, for appellees.

MITCHELL, J.—The facts upon which the rights of the parties to this controversy depend are fully set out in an answer and counter-claim, and are, in substance, as follows:

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Samuel C. Larkin died intestate on the 16th day of September, 1837, residing upon and owning 120 acres of land in Wayne county, Indiana. He left surviving him his widow, Hannah Larkin, and the following named children: Moses F., William C., Martha A., Susannah, Sarah J. and Mary E. Larkin. Susannah died December 1st, 1851; Sarah J. died January 10th, 1859, and Mary E. September 4th, 1859, all dying childless and without having been married. On the 22d day of December, 1853, Moses F. conveyed all his interest in the common estate, being that inherited from his father and deceased sister Susannah, to his brother William C., who also owned a forty-acre tract in his own right in the same quarter section. On the 3d day of August, 1864, William C., Martha A., who was then the wife of David S. Lee, and their mother, Hannah Larkin, made an agreement for the purpose of effecting a partition and division, so that William C. should have his share in severalty, and the mother and Martha theirs together. The agreement was, in substance, that William should have a thirty-acre tract of the common estate which adjoined his forty, and twenty-five and one-half acres in addition off the north end of the common property, which adjoined the thirty-acre tract. It was agreed that the thirty and twenty-five and one-half-acre tracts should constitute his full share in the whole estate at that time, and that Martha was to have all his interest in the remaining sixty-five and one-half acres, in consideration of which she and her mother agreed to convey their interest in the thirty and twenty-five and one-half-acre tracts.

In pursuance of this agreement, the county surveyor was procured, who surveyed off the twenty-five and one-half acres from the main tract and fixed the boundaries thereto.

William then sold his forty and the thirty and twenty-five and one-half-acre tracts to Eby, and made a conveyance to him, and procured Martha and her husband and his mother to join in the conveyance. Eby took possession of the whole, built a line fence on the boundary as fixed by the surveyor,

paid the whole purchase-price to William, and occupied the land accordingly for a period of fourteen years before the bringing of this suit.

Martha and her husband and mother occupied the whole up to the time of this arrangement, accounting meanwhile to William for his share of the proceeds. After this agreement they occupied the sixty-five and one-half acres exclusively, made lasting and valuable improvements on it, William making no claim whatever to any interest in it. By mistake or oversight, William C. never made any conveyance of his interest in the sixty-five and one-half-acre tract to Martha, which it was agreed, as part of the original arrangement, should be done.

At the time of the agreement above mentioned between William C. and Martha A. and their mother, Moses F. Larkin owned a small interest in all the land, which he acquired by the death of his sisters Sarah J. and Mary E., which events occurred after he had conveyed to his brother William C. No notice whatever was taken of this interest in the attempt at partition between William C. and Martha, and so far as appears he consented to that arrangement.

On the 4th day of August, 1873, Hannah Larkin died, having remained a widow from her husband's death. She left no descendible estate in the land, except what she inherited from her deceased daughters, which it is conceded went in equal shares to her surviving children, Moses F., William C. and Martha A.

William C. Larkin, after his mother's death, became and still is insolvent. On the 26th day of May, 1877, the plaintiff, Abraham J. Savage, with notice of the rights of Martha A. Lee, purchased at a sheriff's sale, which was made by virtue of an execution issued on a judgment taken against William C. Larkin, all his interest in the sixty-five and one-half-acre tract, and upon that sale he took a deed from the sheriff May 31st, 1878.

On the 28th day of October, 1878, he commenced this pro-

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ceeding in the court below for partition, and now claims that the arrangement between William C. and Martha A. and her mother was not effectual to vest any right in Martha to William's interest in the sixty-five and one-half-acre tract, and that he is entitled to have his whole interest set off to him as though no agreement had ever been made.

The questions which are presented for decision are :

1. Did the arrangement between William C. Larkin and his sister constitute an executed parol partition? 2. If it did not, was the agreement such, and was it so far performed, as that it can be specifically enforced in equity in her favor? 3. If it was not enforceable between the parties to it, have they so far performed it that no other person may invoke the statute of frauds to avoid it?

That a parol partition of real estate, which is consummated by possession, is binding, is not now an open question in this State, and that an agreement for partition of lands is not within the statute of frauds is also settled. *Moore v. Kerr*, 46 Ind. 468; *Bumgardner v. Edwards*, 85 Ind. 117.

This proposition is not seriously disputed, but it is contended that neither the facts averred nor proved bring the case within the rule. In any view which may be taken of the transaction, it does not seem possible to conclude that there was either a partition consummated, or an agreement which if fully carried into execution would have effectuated that result.

Had there been but two tenants in common, the contract set out, if carried into execution, might aptly have been called an agreement for partition; or, if all those interested in the estate had engaged to set off to any one, or more, his or their interest in severalty, either in the whole or any part of the common estate, the same result would have been reached if the engagement had been consummated.

Partition does not require that the interests of all the joint tenants, or tenants in common, be severed, but it can not be said that a voluntary partition is made, or agreed to be made,

unless by the agreement of all the parties concerned in the property there is, or is to result therefrom, a severance of the interest of one or more of the joint owners in at least some part of the common property. *McConnell v. Carey*, 48 Pa. St. 345; *Gates v. Salmon*, 46 Cal. 361.

At the time the agreement we are considering was made, Hannah Larkin, the widow, Moses F. and William C. Larkin and their sister Martha, were tenants in common of the estate. True, the interests of the mother and Moses F. were inconsiderable, but they were tenants in common nevertheless. Assuming that the arrangement was fully consummated as agreed upon between William C., Martha and their mother, the result was that Moses F. was tenant in common with William C. in the thirty and twenty-five and one-half-acre tracts, and was also the like tenant with Martha and his mother in the residue, and, therefore, had the right to bring the whole estate into court and ask partition without regard to what had previously taken place between any of the other tenants; in other words, the interest of Moses F. in the whole estate remained unaffected, and no arrangement between tenants in common can result in a partition unless it operates upon and affects the interests of all in at least some part of the common estate.

Under the rule of decision announced by this court in the cases already cited, it would be conceded that if the arrangement had been for a technical partition, the statute would have no application.

The purpose of the parties to the agreement was manifest. The brother desired, by an exchange of his interest in the sixty-five and one-half-acre tract, to acquire the interest of his sister and mother in the thirty and twenty-five and one-half-acre tracts. The exchange was orally agreed upon, and was so far consummated as that the sister and mother conveyed their interests on the one hand, at William's request to Eby, who at once took possession in pursuance of the arrangement, and has ever since maintained it. Whatever pos-

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session Martha previously had of that part of the common property she surrendered, and took all the possession that it was possible for her to take of the sixty-five and one-half-acre tract. Her possession, which up to that time had been as tenant in common with her brother William in the whole tract, then became in the sixty-five and one-half-acre tract exclusive of him; while the possession of William's grantee in the other tracts became exclusive of her. Neither could have entered on to the possession of the other without becoming a trespasser. In this change of possession there had been mutual acquiescence by all parties for a period of fourteen years. Superadded to this was the fact, corroborative of the contract and of the purpose of the possession, that Martha made lasting and valuable improvements.

That an oral contract made by tenants in common for the exchange of undivided interests in lands is within the operation of the statute, can not be doubted; but that the same character of taking possession is necessary to withdraw such a contract from its operation, is a proposition which is not supported by the weight of authority.

Courts of the highest authority have gone much farther than we find it necessary to go in this case, and have held that while the requisites to take a parol contract for the exchange of lands out of the operation of the statute are the same as in sales, there is nevertheless a marked difference in the evidence which establishes the possession; and so it was said in the case of *Moss v. Culver*, 64 Pa. St. 414; S. C., 3 Am. R. 601: "A sale is confined to a subject coming from a single side. It has no relation to, or dependence on any other subject. The evidence of possession taken of it is therefore confined to the single subject. * * * But an exchange necessarily has a subject on each side which stands related to the other. * * If therefore the evidence shows a clear, unequivocal, and complete taking possession of one of the subjects of an exchange, by the party owning the other subject, it strengthens the evidence of a possession taken by the opposite party of the

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corresponding subject. Evidence of possession that might seem weak and inconclusive in the case of a parol sale, is thus made clear and convincing in the case of an exchange." See, also, *Reynolds v. Hewett*, 27 Pa. St. 176; *Baldwin v. Thompson*, 15 Iowa, 504; *Devin v. Himer*, 29 Iowa, 297; *Sweeney v. O'Hara*, 43 Iowa, 34.

In the case of *Caldwell v. Carrington*, 9 Peters, 85, it was held that where an exchange of lands had been made by an oral contract, the taking possession by one of the parties took the contract out of the statute of frauds.

In the case of *Littlefield v. Littlefield*, 51 Wis. 23, which is analogous in principle to the case under consideration, the learned justice delivering the judgment of the court said: "If these cases mean that a tenant in common in possession, who purchases by parol of his cotenant also in possession, can not take the exclusive possession of the land from thenceforth, and on performance of the contract maintain an action for its specific performance, especially if in good faith he makes valuable improvements upon the land, we can not follow them." Reed Statute of Frauds, section 582; *Parrill v. McKinley*, 9 Grat. 1.

Mrs. Lee having conveyed away her interest in the one part of the common property in all respects according to the agreement, and her grantee having taken the exclusive possession of the tracts so conveyed under the contract, and she having taken possession of the other to the exclusion of her brother, and having in good faith made valuable improvements, these facts constituted such a part performance that it would now result in a gross fraud upon her to permit the statute to be invoked to defeat her rights under the contract. A court of equity will not permit the statute to be interposed, when the contract has been so far performed in reliance upon it that its interposition would work a fraud upon an innocent party. *Teague v. Fowler*, 56 Ind. 569; *Tinkler v. Swaynie*, 71 Ind. 562.

The appellant purchased with notice of her rights, and

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can not be in any better position than the person through whom he claims.

It is argued that as a contract which is within the statute is not void, and because the right to take advantage of the statute is a right personal to the parties to the contract and those in privity with them, the appellant is, therefore, not in a position to avail himself of its benefits. That the right to take advantage of the statute of frauds is a personal privilege, and that it is only competent for one who is a party to the contract, or his privies or representatives, to repudiate it by interposing the statute, is the settled law of this State. *Morrison v. Collier*, 79 Ind. 417; *Cool v. Peters, etc., Co.*, 87 Ind. 531; *Dixon v. Duke*, 85 Ind. 434, and cases there cited.

Whether the appellant's purchase at a sheriff's sale, under the circumstances disclosed, put him so far in privity with William C. Larkin as that he could avail himself of the statute, we do not, in view of the conclusion already reached, decide. We think the evidence sustains the answer and counter-claim, and that there is no error in the record.

Judgment affirmed with costs.

Filed April 29, 1885.

No. 11,826.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY v. BOGGS.

RAILROADS.—*Negligence.*—*Injuries to Travellers at Public Crossings.*—*Statutory Signals.*—It is the duty of railroad companies to give the signals required by statute when approaching a public crossing, and a breach of this duty constitutes actionable negligence. The purpose of the statutory signals is not merely to give notice that a railroad track crosses the highway, but also to warn travellers on the highway of the approach of trains.

SAME.—*Running Trains so Close as to Make Signals Unavailing.*—Where one train is run so close behind another as to make the statutory signals unavailing as means of warning travellers, the railroad company is guilty of negligence.

101 522
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101 522
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139 375

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141 109
143 466

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161 657

162 651

101 522
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101 522
171 594

171 598

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SAME.—*Right to Instruct as Matter of Law that Disobedience of Statute Constitutes Negligence.*—The court has a right to instruct, as matter of law, that a failure to give the statutory signals at public crossings constitutes negligence.

PRACTICE.—*Instructions.*—*Repeating.*—Where the jury is once fully and clearly instructed upon a given point, the court is not bound to repeat the instructions in different language.

From the Vermillion Circuit Court.

J. Henry, W. Armstrong, J. Jump and C. W. Ward, for appellant.

C. V. McAdams, J. G. Pearson, J. C. Sawyers and O. B. Gibson, for appellee.

ELLIOTT, J.—On the morning of the 16th of July, 1883, the appellee and her husband were driving along a highway which the appellant's track crossed. As they neared the crossing, they heard a locomotive and train approaching, and they stopped until that train had passed. As soon as that train had cleared the highway, the appellee's husband started the horses into a brisk trot, and attempted to cross the track, but the wagon was struck by a train which was following the one that had gone over the crossing, and the appellee was thrown out and seriously injured. There is a sharp conflict in the evidence as to how closely the rear train was following the leading one, but there is evidence fully warranting the inference that there was only a very short distance between them, and that there was an interval of a very few seconds only between the time the one left the crossing and the time the other ran upon it. There was evidence tending very strongly to show that during the summer the growing grain, the rank weeds and luxuriant foliage of trees and bushes obstructed the view of the crossing from the highway. The track runs through a deep cut and makes a curve before reaching the crossing, and these, combined with other things, made it very difficult to see an approaching train. The appellee and her husband were old persons, the former sixty-five years of age and deaf in one ear. They were both well ac-

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quainted with the crossing, and had very frequently driven over it. The appellee testified that she and her husband did look and listen for approaching trains as soon as they reached a point where they could see, but that they neither saw nor heard the train which ran into the wagon until they had driven upon the track. The train which first passed the crossing was composed of seventy-three cars, and was about one-half mile in length. There was a direct conflict as to whether the whistle was blown or the bell sounded by the persons in charge of the engine which struck the appellee, and there was also much evidence tending to show that the clatter and noise of the first train was so great that it would have drowned the sound of the bell or whistle, even if the signals required by law had been given by the hindmost train.

The statute requiring signals to be given at a designated distance before reaching the highway crossing is intended to compel railroad companies to sound warnings of the approach of trains, and is not intended, as appellant assumes, merely to warn travellers that a railroad track crosses the highway. The duty is imposed by law, and its breach constitutes negligence. It is a familiar principle that a breach of duty constitutes actionable negligence, and it is upon this principle that the adjudged cases, without conflict, declare that the omission to give the signals required by statute constitutes such negligence as renders the company liable to one who, without fault on his part, has suffered injury as the result of that negligence. It is hardly necessary to quote from the authorities upon this subject, yet, for the purpose of setting the question in full view and throwing upon it a clear light, we do quote from some of the text-books. In a recent work it is said: "When by law bell ringing and sounding the whistle are required in approaching and passing over public road crossings, the omission thereof amounts to actual negligence on the part of the company." 2 Rorer R. R. 1006. Another author says: "The company is liable for injuries caused by its omission of these duties, when imposed by stat-

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ute. The omission is calculated to mislead the traveller, and to assure him that the coming of the train is not imminent; and it is evidence of negligence." Pierce R. R. 350. In speaking of duties imposed by statutes upon railroad companies, it was said in another text-book, that "These regulations being clearly intended for the protection of travellers, it would seem natural to suppose that any violation of them should be deemed culpable negligence, in an action brought by a traveller." Shearman & Redfield Neg., section 484. Wharton says: "Even where a statute is in force requiring the use of a bell or steam-whistle or other signal at a crossing, while the omission to comply may, under the statute, create a *prima facie* case against the company, it is a good defence that the plaintiff saw the train, and recklessly exposed himself to the collision. When, however, the injury results from the omission of the signal, then the railroad is liable." Wharton Neg., section 804. In the case of *Pittsburgh, etc., R. W. Co. v. Martin*, 82 Ind. 476, it was said, in speaking of our statute: "While such a law existed, a violation of it was undoubtedly a failure to give reasonable, proper and timely notice. The signal required by the law not being given, the view being obstructed, and the plaintiff not being hard of hearing, he had no reason to suppose that the train was within eighty rods of the crossing; he was misled by the defendant's negligence in omitting the proper signal; he was not guilty of negligence in assuming, in the absence of any indication to the contrary, that the company was obeying the law, and that no engine was advancing toward the crossing within a distance of eighty rods." In the recent case of *Cincinnati, etc., R. W. Co. v. Hiltzhauer*, 99 Ind. 486, the general subject was discussed, and it was held that the omission to give the signals required by statute constituted negligence, and that the statute gave a right of action to one injured in person or property by such negligence.

It may be laid down as settled law, that the omission to give the signals required by statute constitutes culpable neg-

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ligence, and that such signals are intended to warn travellers, in lawful use of the highway, of approaching trains. As this is settled law, positively declared by statute, the railroad company can not disobey it without incurring liability to a traveller who is injured without fault on his part contributing to the injury. Nor can the company by its own wrong render unavailing the signals required by law. If it runs one train so close upon another that there is no time to give the warning in the manner prescribed by law, it is guilty of negligence. It is obvious that the object of the statute would be defeated if one train could be run so close to another as that the noise and rumble of the leading train would drown the signals given by the train following it. Railroad companies have no greater rights to the crossing than the traveller, except the right to priority in passing, and they have no right to do any act that will mislead a traveller and expose him to needless danger.

In *Beisiegel v. New York Central R. R. Co.*, 34 N. Y. 622, 633, it was said: "The omission of the customary signals was an assurance by the company to the plaintiff that no engine was approaching within a quarter of a mile on either side of the crossing. On this he was entitled to rely, and to the defendant he owed no duty of further inquiry." In the course of the opinion in *Owen v. Hudson River R. R. Co.*, 35 N. Y. 516, it was said: "As a general proposition, the public has a right to rely upon the performance of its duty by a railroad company, and no one can be justly charged with negligence as against a wrongdoer, either violating or omitting its duty for such reliance." Another court says: "The citizen who, on a public highway, approaches a railway track, and can neither see nor hear any indication of a moving train, is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous." *Kennayde v. Pacific R. R. Co.*, 45 Mo. 255. It was said in *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. St. 60, 72, in speaking of the omission to give the signals required by law: "For, if by negligence or omission of those

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in charge of the train his vigilance was allayed, they are not at liberty to impute the consequence of their acts to his want of vigilance, a quality of which they deprived him." Even where there is no statute requiring signals to be given, or flagmen stationed at crossings, yet, if it has been customary to give signals or provide flagmen, it may be negligence to discontinue them. *Pittsburgh, etc., R. W. Co. v. Yundt*, 78 Ind. 373 (41 Am. R. 580). It is, indeed, a general rule that citizens have a right, within reasonable limits, to act upon the presumption that a corporation charged with a duty will perform it. *City of Indianapolis v. Gaston*, 58 Ind. 224; *Davenport v. Ruckman*, 37 N. Y. 568.

We need not, and do not, go to the extent that some of the courts have gone upon this general subject, and our purpose in referring to these cases is to make plain the great importance which the courts have everywhere attached to the duty to give notice of the approach of a moving train by the signals prescribed by law. If, as all agree, this duty is of such grave importance, and is of such great benefit to the traveller, then it must follow that the railroad company can not deprive the traveller of the benefit which the statute secures to him by negligently running trains so near together as to make the signals of the rear train useless and ineffective.

There are many cases holding that if a railroad company creates an appearance of safety, and a traveller, influenced by the appearance, enters upon the track and is injured, he may maintain an action for the injuries resulting from the negligence. *French v. Taunton Branch R. R.*, 116 Mass. 537; *Bonnell v. Delaware, etc., R. R. Co.*, 39 N. J. L. 189; *Ernst v. Hudson River R. R. Co.*, 39 N. Y. 61; *Sweeny v. Old Colony, etc., R. R. Co.*, 10 Allen, 368.

This principle applies here, and is, indeed, essentially the same as that declared in the cases we have referred to. It certainly is negligence to create an appearance of safety where there is, in fact, danger, and such a false appearance is created when one train follows another so closely as not to allow time

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for giving the signals prescribed by statute. We have seen that the traveller has a right to presume that the law will be obeyed, and acting upon this presumption he has a right to assume that the company will not move one train so close upon another as to render of no avail the provisions of the statute. If the traveller can, by the exercise of ordinary prudence, discover and avoid the danger, he must, of course, do so, but this by no means proves that the wrongful act of the railroad company does not constitute negligence.

A railroad company does not always exonerate itself from liability by obeying the requirements of the statute. Mere obedience to the statute, when obedience would serve no useful purpose, is not enough. Obedience, when obedience brings no protection to the traveller, is unavailing. In a leading case upon this subject it was said: "The statute makes certain positive regulations, and the defendants, at their peril, are bound to comply with them; but there are no negative words, and there is no implication that a compliance was to absolve them from any duty which they were under before; and, therefore, if other precautions were necessary, the defendants were still bound to take them." *Bradley v. Boston, etc., R. R.*, 2 Cush. 539. A text-writer says: "The duties imposed by statute in such cases, in regard to bell ringing and whistling, and putting up signs, are in their nature cumulative, and are not intended as a substitute for such other means of observing ordinary care as a reasonable regard for the safety of others may require." 2 Rorer R. R. 1014. Thompson says: "Mere employment of statutory signs and signals will not exonerate the company when their servants are otherwise negligent." 1 Thompson Neg. 421. By another writer the rule is thus stated: "Statute provisions requiring signals to be given are cumulative only, and the company is still bound to use such other precautions as are required in the prudent and skilful management of its road." Pierce R. R. 349. Judge Redfield says: "In a case where the plaintiff was injured at a railway crossing by collision with

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an engine, it was held that where the statute required, at such points, certain specified signals, the compliance with the requirements of the statute will not excuse the company from the use of care and prudence in other respects." 1 Redfield R. W. 566. To much the same effect is the language of Wharton. Wharton Neg., section 805.

If it be true, as it unquestionably is, that a compliance with the requirements of the statute will not always exonerate the railroad company, it must be true that a railroad company is guilty of negligence, if, by its own acts, it makes the statutory signals unavailing. It can not be legally possible that a railroad company may so run two trains as to make the statutory signals ineffective for the purpose for which they were intended, and yet exculpate itself by evidence that it complied with the letter of the statute. It would completely frustrate the purpose of the law to permit a railroad company to make the statutory signals ineffective by so running its trains as to make the signals of no avail as warnings to approaching travellers. It is, as we have seen, negligence to omit a duty, or perform an act constituting a legal breach of duty, and it conclusively follows that it is negligence to do an act that makes the performance of duty entirely ineffectual. Travellers, who are themselves exercising due diligence, are entitled to have the law obeyed in such a manner as that it shall substantially accomplish the purpose its framers meant it to accomplish.

There are very many cases where the court may properly charge the jury that certain acts constitute negligence. We quote from a recent case this statement of the law: "But, as was said in *McCully v. Clarke*, 40 Pa. St. 399, there are some cases in which a court can determine that omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, a failure to perform it is, of course, neg-

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ligence, and may be so declared by the court." *Schum v. Pennsylvania R. R. Co.*, 19 Reporter, 184.

There are a great number of cases affirming that the court may, in a proper case, assume the facts hypothetically, and instruct the jury that they do, or do not, constitute negligence, and this, Judge Cooley says, is always the proper course where the act involves a violation of a statutory rule or a settled principle of law. Cooley Torts, 670. Our own cases have often declared and enforced this doctrine. *Binford v. Johnston*, 82 Ind. 426 (42 Am. R. 508), and authorities cited. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186, and authorities cited. Perhaps the most familiar illustration is afforded by those cases which hold that it is negligence as a matter of law in a traveller to attempt to cross a railroad track without looking and listening for approaching trains. We think the court did right in this case in instructing the jury, that if the view of the track from the highway was obstructed, so that a train could not be seen, and the appellant ran a train so close behind another as not to allow time for the statutory signals to be given, the railroad company was guilty of negligence. The duty to give the signals in the manner prescribed by statute was a determinate one, and so, also, was the duty to so conduct the running of trains as not to defeat the purpose of the statute and render the signals useless. The instructions upon this point properly left the questions of fact to the jury, and pronounced the law upon the facts hypothetically assumed.

The court very clearly instructed the jury upon the question of contributory negligence, and it was not bound to repeat the instruction in different language. Where a jury is once fully and clearly instructed upon a material point, it is sufficient. If it were otherwise, great confusion would result, and instructions would do quite as much harm as good. *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 63. The instructions given at the request of the appellant, upon the subject of the duty of a traveller approaching a railway crossing,

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were full and clear, and properly told the jury that the appellee was bound to exercise care and prudence, and that it was incumbent upon her and her husband to look and listen before driving upon the track. In one of the instructions the jury were told that if the appellee and her husband knew of the crossing, and had often passed over it, they were bound to use more care than if they had not previously known it; so that the appellant has no cause to complain of the refusal of an instruction embodying the same doctrine. The only doubt is whether the instruction given was not more favorable to the appellant than the law warrants, for it may well be questioned whether, in any case, there is a higher duty resting upon the traveller than that of looking and listening.

The rejection of evidence is not presented in such a form as to be available, because it does not appear that appellant properly stated what evidence its questions would elicit.

We can not disturb the verdict upon the evidence. Judgment affirmed.

Filed Feb. 18, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—In the brief on the petition for a rehearing counsel direct our attention to a prefatory part of the bill of exceptions, and insist that it shows what facts they offered to prove. We have again examined the record, but find no statement of any specific matters that the appellant expected to elicit from the witness. We do find the statement of the purpose for which the appellant asked to introduce the testimony; we find a recital that the court afterwards charged the jury, in accordance with appellant's theory; we find a skeleton of the questions asked, but we find no statement of the evidence which it was expected the questions would elicit. There is much in the bill as to the purpose of the appellant, but, unfortunately, not what is needed in the way of stating the specific facts that the witnesses would testify to. It is now too well settled to admit of debate, that the party must

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state the evidence he expects to elicit, or else he can not have the ruling reviewed in this court.

Petition overruled.

Filed May 14, 1885.

No. 11,521.

THE STATE, EX REL. KENDALL, AUDITOR, *v.* GREENE ET AL.

SCHOOL FUND.—*Loan to County Auditor. — Mortgage, Foreclosure of.*—The auditor of a county executed a mortgage on his land to the State to secure the repayment of money which he borrowed from the school fund in the custody of said county. Afterwards his successor in office entered upon the margin of the record where said mortgage was recorded a statement that said mortgage, by a decision of the Supreme Court of this State, was held to be invalid, "said court holding that a county auditor can not give a mortgage to the State for school funds while acting in that capacity, and the mortgagor," naming him, "having been county auditor when the mortgage was made, the amount of this mortgage was, by direction of the board of county commissioners of" said county, "re-fundred to the school fund February 29th, 1882." This entry was attested by the signature of the auditor who made it. Afterwards the treasurer of said county, with the approval of the county commissioners, transferred to said school fund from the revenues of the county the full amount of said loan. Afterwards said mortgage and the note which it secured were surrendered to one then the owner of the land, not the mortgagor, and he to whom such surrender was made afterwards sold and conveyed the land to another, who, without notice of these facts, purchased for full value. In a suit against this purchaser by the State, on the relation of a succeeding auditor of said county, to foreclose said mortgage,

Held, that a county auditor can not lawfully both lend and borrow from the school fund, and that said loan was made and said mortgage was executed without authority of law.

Held, also, that such want of authority constituted no defence for the mortgagor or any other person to the foreclosure of the mortgage.

Held, also, that the mortgage remained a subsisting security for the loan against said vendee for value and without notice, notwithstanding the reimbursement of the school fund out of the county revenues, and said entry on the margin of the record, and said surrender of the mortgage without endorsement of satisfaction thereon, and without satisfaction of record.

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From the Hendricks Circuit Court.

F. T. Hord, Attorney General, *J. V. Hadley*, *E. G. Hogate*
and *R. B. Blake*, for appellant.

L. M. Campbell, for appellees.

BEST, C.—On the 21st day of January, 1874, William M. Hess and wife executed a mortgage to the State of Indiana to secure the loan of \$750 of school funds, and this action was brought to foreclose such mortgage against the appellees as subsequent purchasers.

An answer of three paragraphs was filed. The first was the general denial, and this paragraph was subsequently withdrawn. The second averred, in substance, that said Hess was the acting county auditor of Hendricks county at the time he executed such mortgage, and that the only consideration for the execution of the same was the money he drew from the school fund upon his own warrant issued thereon in violation of law.

The third averred, in substance, the same facts as the second, and in addition thereto alleged that thereafter William H. Nichols, the then acting auditor of said county, entered upon the margin of the record where said mortgage was recorded the following statement: "This mortgage, by a decision of the Supreme Court of the State of Indiana, is held to be invalid, said court holding that a county auditor can not give a mortgage to the State for school funds, while acting in that capacity, and the mortgagor, William M. Hess, having been county auditor when the mortgage was made, the amount of this mortgage was, by direction of the board of county commissioners of Hendricks county, Indiana, refunded to the school fund February 29, 1882.

"Attest: WILLIAM H. NICHOLS, Auditor H. C."

That thereafter, and before the appellees acquired title to said premises, the treasurer of said county, with the approval of the county commissioners, transferred to said school fund, from the revenues of the county, the full amount of said loan

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and the interest thereon, all of which was approved by the State; that thereafter the note and mortgage made by said Hess were surrendered to one Homan, who then owned said land, and afterward these appellees, without any notice of the facts, purchased said land of said Homan for full value, and received from him a deed of conveyance therefor; that had they not believed that said school fund was fully reimbursed and said mortgage satisfied, they would not have purchased said land, etc.

A demurrer to each paragraph was overruled, and the appellant declining to reply, final judgment was rendered for the appellees. The ruling upon the demurrer is assigned as error.

The facts averred in the second paragraph of the answer show that the loan was made and the mortgage executed without authority of law. There is, it is true, no express prohibition against making such loan, but the duty to loan the money and accept the security rests upon the auditor, and this duty necessarily precludes him from borrowing the money. He can not rightfully loan for the State and borrow for himself. Such a transaction is wholly unauthorized. *Ware v. State, ex rel.*, 74 Ind. 181; *Board, etc., v. Axtell*, 96 Ind. 384.

The fact, however, that the auditor had no authority to make such loan constitutes no defence to the foreclosure of the mortgage. The money was obtained and the security given, and if the State chooses to accept the mortgage, the mortgagor can not exonerate himself from his liability to repay the money, nor shield his land from the lien thus created to secure it, by asserting his want of authority to make it. He is bound by his mortgage. The State, however, is not bound. It may repudiate the entire transaction and at once bring an action to recover the money thus misappropriated, as was held in *Ware v. State, ex rel.*, *supra*, but if it elects to accept the mortgage, as has been done in this case, the want of authority in the mortgagor to make it constitutes no defence on behalf of himself or of any other person. This is

The State, *ex rel.* Kendall, Auditor, *v.* Greene *et al.*

so plain and just, and the principle upon which it rests is so well supported by our own cases, as to forbid further discussion. *Deming v. State, ex rel.*, 23 Ind. 416; *Scotten v. State, ex rel.*, 51 Ind. 52.

The additional facts alleged in the third paragraph of the answer, in our opinion, constituted no defence to the action. The statement of the auditor, entered upon the margin of the record, did not purport to be a satisfaction of the mortgage. It simply stated that this court had decided that such mortgage was void, and that the school fund had been reimbursed from the county revenues. This statement did not purport to show an extinguishment of the mortgage. The mere reimbursement of the school fund from the county revenues neither pays the debt nor impairs the security. The law requires the county to keep the school fund intact whenever default is made in the payment of such loans. The discharge of this duty, however, does not impair the security taken. This remains and may be enforced precisely as though the fund had not been reimbursed. Nor does the reimbursement of the fund operate as an equitable assignment of the mortgage. The mere transfer of money from one fund to another, both held by the same person, can not possibly thus operate. An assignment, legal or equitable, presupposes two parties, and a party can not be subrogated to his own rights nor to a security the legal title of which is in himself. The school fund, by the Constitution, is entrusted to the county, and by law it has the control of its revenues. The former its auditor loans and collects, and whenever default is made in payment it becomes its duty to reimburse the fund and collect the loan. This may be done by advertisement and sale or by judicial decree after as well as before reimbursement of the fund. This fact is wholly immaterial. The same remedies exist for the collection of the loan, the same party is entitled to the money, and as the mortgagor has no personal concern with its disposition after collection, the mere

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fact that the school fund has been reimbursed from the county revenues neither affects the State's right, upon the relation of the auditor, to foreclose the mortgage, nor does it constitute any defence to the action.

As the reimbursement of the fund did not extinguish the mortgage, the same remains a subsisting security for the payment of the loan, notwithstanding the fact that it was surrendered by the auditor. This he had no authority to do without payment. *Conley v. Dibber*, 91 Ind. 413.

The statement of the auditor that this court held that such mortgages are void is a mere statement as to the law, a statement that he had no right to enter upon the record and one upon which the appellees had no right to rely. They were bound to know the law. If, however, such statement is construed as a declaration that this mortgage had been held void, then the appellees should have relied upon the judgment as an estoppel, and not upon the auditor's statement. The auditor had no authority to make it, and the State is not bound by it.

Aside from this the statute requires the auditor, when he surrenders a mortgage as paid, to endorse thereon satisfaction, and thereupon the recorder is required to enter satisfaction of record. With this mortgage in possession, without such endorsement upon it, and without such satisfaction of record, it would seem that the appellees had most abundant evidence of its non-payment, and under these circumstances no estoppel can arise against the State.

For these reasons we think that neither paragraph constituted any defence to the action, and for the error in overruling the demurrer the judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it is hereby reversed, at the appellees' costs, with instructions to sustain the demurrer to each paragraph of the answer.

Filed Nov. 19, 1884.

The State, *ex rel.* Kendall, Auditor, v. Greene *et al.*

ON PETITION FOR A REHEARING.

NIBLACK, J.—In the case of *State, ex rel., v. Levi*, 99 Ind. 77, which was decided since the opinion in this case was announced, it was held that a loan of the common school fund made by a county auditor to himself was a breach of his official bond, for which an action might be immediately prosecuted, but that a mortgage executed by the auditor to secure such a loan is not void, but voidable only, at the option of those having a supervisory control of such fund; that such a mortgage may, both as to the auditor and those claiming under him, be resorted to and enforced as a means of reimbursing the school fund, looking only to the auditor and his sureties for any deficiency which may remain after the mortgaged land has been exhausted. The conclusion thus reached may now be regarded as the accepted law of this State on the subject to which it relates.

As each county is held liable for the preservation of so much of the common school fund as is, or may have been, entrusted to its care (R. S. 1881, section 4326), it follows that every county occupies the relation of a surety to the State for the skill and good faith of its officers who stand charged with the management and control of its share of that fund. When, therefore, a county reimburses the common school fund on account of some loss, or supposed loss, resulting from the mismanagement of some one or more of its officers, it does so as a surety for the preservation of the fund, and becomes thereby subrogated to all the securities held by, or in the name of, the State as an indemnity against such loss. Whether, therefore, the county reimbursed the school fund in this case was quite immaterial as a defence, since, in any event, the county is entitled to have the mortgage foreclosed in the name of the State, on the relation of its auditor, and to have the proceeds applied to the reimbursement of the proper fund under its control.

The petition for a rehearing is overruled.

Filed May 15, 1885.

Tomlinson *et al.* v. Briles.

No. 11,735.

TOMLINSON ET AL. v. BRILES.

101 538/
123 246

PRACTICE.—Instructions.—Harmless Error.—Where there is no dispute as to the fact that work and labor was performed, and the only dispute is as to the person liable to pay for the work and labor, an omission, in an instruction enumerating the facts which the plaintiff must prove in order to entitle him to a recovery, to state that he must prove performance, is a harmless error, not warranting a reversal of the judgment.

EVIDENCE.—Cross-Examination.—Harmless Error.—Where a witness is fully cross-examined, an erroneous ruling, denying the right to ask one question on cross-examination, is a harmless error.

SAME.—Contract.—Written and Verbal.—Although a contract partly written and partly oral is a mere verbal contract, still the writing is competent evidence.

From the Hamilton Circuit Court.

T. J. Kane and *T. P. Davis*, for appellants.

D. Moss, *R. R. Stephenson* and *H. A. Lee*, for appellee.

ELLIOTT, J.—The evidence shows, without conflict, that work was done by the appellee in grading the bed of a railroad, and the only conflict in the evidence was as to whom the appellee had a right to look for compensation. As there was no conflict in the evidence upon the question of performance of the work, no harm was done the appellant by the first instruction which left out the element of performance in stating the facts which it was incumbent upon him to prove. Had there been any conflict in the evidence as to whether the appellee did do the work, then the instruction would have been erroneous, and in such a material particular as to require a reversal, but, as there was no dispute upon this point, there was no material error in the instruction.

On the cross-examination of John T. Davis, one of the assignors of the appellee, the appellant's counsel proposed to ask whether he, the witness, did not look to Simmons, Aylshire & Co., the contractors, for compensation, and not to the appellants, but the court refused to permit the question to be answered. The appellants were, however, permitted

Anderson *et al.* v. Endicutt *et al.*

to cross-examine in detail as to all the facts of the transaction, and we can not perceive that any substantial injury was done them in refusing to permit an answer to the question propounded by them. As the facts were fully developed, and without restriction upon the right to cross-examine, we can not hold that there was any material error in refusing to allow the witness to answer the general question asked, and it is only for material errors that judgments are reversed.

A written contract between the appellants and Simmons, Aylshire & Co., was admitted in evidence, and of this ruling complaint is made, upon the ground that it was subsequently modified by parol, and that the writing was no longer evidence of the contract. It is no doubt true that a contract partly in writing and partly in parol becomes a mere verbal contract. Where it is necessary to resort to oral evidence to establish terms of the contract, then the whole contract is regarded as a verbal one. *Board, etc., v. Shipley*, 77 Ind. 553; *Pulse v. Miller*, 81 Ind. 190; *Gordon v. Gordon*, 96 Ind. 134; *Board, etc., v. Miller*, 87 Ind. 257; *McCurdy v. Bowes*, 88 Ind. 583, *vide* p. 585; *High v. Board, etc.*, 92 Ind. 580; *Hackleman v. Board, etc.*, 94 Ind. 36, *vide* p. 39. But while it is true that the contract became a verbal one by the changes made in its terms, still the writing was competent evidence, just as a letter, a written admission, or the like, would be in the case of a contract not evidenced in whole or in part by a written instrument. *Stagg v. Compton*, 81 Ind. 171.

Judgment affirmed.

Filed May 13, 1885.

No. 11,560.

ANDERSON ET AL. v. ENDICUTT ET AL.

DRAINAGE.—City.—Drainage Commissioners.—The cities of this State have exclusive jurisdiction of the matter of drainage within their limits, and there is no authority for the construction of drains in cities by drainage commissioners, under the direction of the circuit court.

101	539
128	408
101	539
154	119
154	122
155	419

101	539
170	186

Anderson et al. v. Endicutt et al.

From the Decatur Circuit Court.

J. S. Scobey, for appellants.

J. D. Miller and *F. E. Gavin*, for appellees.

BICKNELL, C. C.—This is an appeal by remonstrants from an order of the Decatur Circuit Court establishing drainage and directing one of the commissioners of drainage to construct the work. A part of the lands through which the drainage would pass are additions to the city of Greensburg, and the controlling question arising upon the appeal is, have the commissioners of drainage any lawful authority to build a drain within the limits of a city either in whole or in part?

The proposed drain was to begin in the city, and run thence 300 feet on Anderson street. It was to be eight feet deep at its commencement, and was to be constructed for 272 feet from the beginning with eighteen inch tile, thence for 402 feet with twenty inch tile, thence for 356 feet with twenty-four inch tile, thence for 496 feet with a brick or stone structure of circular form, of not less than three feet in diameter in the clear, laid in cement, and thence for about half a mile with an open ditch, through the farm of one of the appellants. The drain was to have catch-basins at the commencement, and at each crossing of alleys, and at each side of each street crossed by said drain.

The Revised Statutes of 1881 contain the following provisions as to the power of cities in relation to drainage:

“To fill up or drain any lot or parcel of ground within such city, or within two miles thereof, whenever water has or may become so stagnant and noxious as to be, in the opinion of such council, a nuisance, and injurious to the health or comfort of such city or any part thereof, at the expense of the owner thereof, under such reasonable regulations as the common council shall prescribe,” etc. R. S. 1881, section 3106, clause 2.

“For the purpose of drainage of such city,” the common council “may go beyond the city limits, and condemn lands

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and materials, and exercise full jurisdiction and all the necessary power therefor." R. S. 1881, section 3106, clause 26.

"To regulate all bridges, culverts, sewers, canal or draw-bridges, and the location thereof." R. S. 1881, section 3106, clause 40.

"To construct and regulate sewers, drains, and cisterns, and provide for the payment of the cost of constructing the same.

* * To provide for the estimate of the cost thereof, and the assessment of the same upon the owners of such lots and lands as may be benefited thereby, in such equitable proportions as the common council may deem just," etc. R. S. 1881, section 3106, clause 43.

"The common council shall have power to construct and regulate sewers, drains, and cisterns, and provide for the payment of the cost of constructing the same; and when, in its opinion, the construction of any sewer would be of public benefit to the city and necessary for the improvement of any street or streets, for the removal of surface or storm water therefrom, may, by a two-thirds vote, cause to be paid out of the city treasury such portion of the cost of the construction of such sewer as, in the opinion of said council, would be equitable and just." R. S. 1881, section 3151.

The Revised Statutes contain also the following provision as to the power of the city in relation to its streets: "The common council shall have exclusive power over the streets, highways, alleys, and bridges within such city." R. S. 1881, section 3161.

We think that under the foregoing statutes a city has exclusive jurisdiction over the subject of drainage within the city limits, and that the commissioners of drainage have no authority to build drains in the streets of a city or within its boundaries. It is true that section 1 of the act of March 8th, 1883 (Acts 1883, p. 173), provides that a petition for drainage under that act "shall also state that in the opinion of the petitioners or petitioner either that the public health will be improved, or that one or more public highways of the

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county, or street or streets of a town or city, will be benefited by the proposed drainage." But this provision gives no jurisdiction over the streets of the city or within the city. A street or streets of a city may be benefited by drainage adjacent to the city and not within its limits, and in such a case the act of 1883 authorizes that fact to be stated in the petition as one of the grounds of the application. The law does not contemplate any conflict of jurisdiction or any concurrence of jurisdiction between two such distinct bodies as the drainage commissioners and the common council. We think the circuit court had no jurisdiction to authorize the construction of the proposed drainage. The judgment, therefore, ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellees, and this cause is remanded, with instructions to the court below to dismiss the proceedings for want of jurisdiction.

Filed April 8, 1885; petition for a rehearing overruled May 21, 1885.

No. 11,410.

BLANCHARD v. JONES.

INSTRUCTIONS TO JURY.—*Supreme Court.*—If instructions given to the jury, taken as a whole, express the law applicable to the case without material contradiction, the judgment will not be reversed because some one instruction, if considered by itself, is capable of an application which would ignore a material question involved in the issues.

SAME.—*Erroneous Instructions Given on Request of Appellant.*—An appellant can not complain in the Supreme Court of an inconsistency in instructions caused by the giving of instructions, asked by himself, which present a theory different from that contained in other instructions given, which state the law correctly.

PRINCIPAL AND AGENT.—*Real Estate Agent Bound to Disclose Offers.*—*Principal Entitled to Price, Agent to Commission Only.*—An owner of real estate appointed an agent to sell it, at not less than a certain price, agreeing

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that if during a certain period the agent would furnish a buyer at such price, he should be paid by said owner a certain per cent. commission on the amount for which the property should be sold. The agent sold for a better price. In a suit by the principal against the agent, to recover a portion of the price retained by the agent in addition to such commission,

Held, that if said agent, acting under such appointment, received a more advantageous offer than he was so authorized to accept, it was his duty to communicate the offer so received to his principal, and not to purposely conceal it from him; and that if, so acting as agent, he effected a better trade than he was so authorized to make, said owner was entitled to the benefit of the trade, and was bound to the agent only for his commission, and not for any surplus of the price received above the amount which the agent was so authorized to accept.

From the Vigo Circuit Court.

S. C. Davis, S. B. Davis, M. G. Rhoads and J. C. Sawyer,
for appellant.

C. F. McNutt, I. H. C. Royse, J. G. McNutt and J. Jump,
for appellee.

BLACK, C.—The appellee, Caroline E. Jones, sued the appellant, the complaint being in three paragraphs. In the first paragraph she showed that on the 30th of January, 1882, she appointed and employed the defendant as her agent to sell a certain farm then belonging to her, described, in Vigo county, said appointment being evidenced by a written instrument set out, by the terms of which William A. Jones, husband of the plaintiff, for her appointed the defendant as agent to sell said land “at not less than \$14,000, on the following terms: \$5,000 down, \$3,000 in one year, at six per cent. interest, and \$6,000 in four years from December 18th, 1881, at seven per cent. annual interest; the same to remain in his hands for twelve months, and thereafter until withdrawn at my written request. If he furnishes me a buyer for said land at the price above stated during said period, then I agree to pay him two and one-half per cent. commission on the amount for which said property is sold.” Other provisions of the instrument need not be set out.

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It was alleged that in April, 1882, the defendant, under said contract, effected a bargain and contract of sale of said land to one John C. Johnson for \$14,000, with the right in the plaintiff to occupy the farm till March, 1883, and to keep part of the crops of 1882, said sum to be paid in cash; that, in pursuance of said bargain and sale, the plaintiff and her husband conveyed said farm to said Johnson by warranty deed delivered to him through the defendant, to whom as such agent said Johnson paid said sum of \$14,000 in cash; that on the 1st of May, 1882, the defendant delivered \$12,600 of said purchase-money to the plaintiff, and with intent to cheat and defraud her falsely and fraudulently represented that he had not received, and was not to receive, from said Johnson any greater sum than \$12,600 and his commission of two and one-half per cent., and, with such intent, fraudulently concealed from her the fact that he had sold the farm for and received \$14,000; that the plaintiff, relying upon his honesty and truthfulness, and believing his representations, and being ignorant of the fact that he had received \$14,000, accepted said sum of \$12,600; that the defendant, without right, had converted to his own use \$1,050 of the money so received by him, and though she had demanded the sum of him he had refused to pay over the same to her.

The second paragraph charged that the defendant was indebted to the plaintiff in the sum of \$1,400 for money had and received by him to her use on a sale of real estate made by him for her to said Johnson in 1882, and which the defendant wrongfully retained and fraudulently converted to his own use.

The third paragraph showed said written appointment, on the 30th of January, 1882, of the defendant, who, it was alleged, was engaged in the business of buying and selling real estate on commission; that on the 19th of April, 1882, the defendant, as the plaintiff's agent, contracted a sale of said farm to said Johnson upon terms set forth, being the same as stated in the first paragraph; that thereafter the defendant,

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with intent to defraud the plaintiff, by false and fraudulent representations made by him to her, stated with particularity, induced her to consent to sell and convey said farm to said Johnson for \$12,600 cash and a portion of the crops for 1882, and the defendant's commission of two and one-half per cent., and to sign and acknowledge, and through the defendant to deliver, a warranty deed for said farm to said Johnson, who paid the defendant said sum of \$14,000, and agreed to such retention of a part of the crops; that the defendant, fraudulently concealing from the plaintiff the fact that he had received \$14,000, falsely represented to her, with intent to defraud her, that said sum of \$12,600 and two and one-half per cent. commission was all the money that he had been able to get from said Johnson for the farm; that she, believing his representations, and being ignorant of the fact that he had received said sum of \$14,000, accepted said sum of \$12,600; that in June, 1882, she learned of said fraud, and demanded of the defendant the remainder of her money, \$1,050, and he refused to pay over the same.

The defendant answered in three paragraphs, the first being the general denial.

The second paragraph was directed to the first and third paragraphs of the complaint, and alleged, in substance, that the defendant, pursuant to the written authority referred to in the complaint, tried to effect a sale to said Johnson but could not secure from him a definite offer; that Johnson contended that \$14,000 was too great a price, and would make no terms except upon a cash basis, and would not and did not offer any definite price; that while it was uncertain as to what Johnson would give, defendant represented to the plaintiff that the sale to Johnson was in doubt on the terms of said appointment, but that he might agree to pay \$12,600 cash and allow her to keep two-thirds of the crops for 1882, and that perhaps enough more could be obtained from him to pay the defendant for his trouble and expense; that the

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plaintiff and her husband finally agreed with the defendant that they would sell to Johnson for \$12,600 in cash and retain the farm for the season of 1882, paying Johnson one-third of the crops, if the defendant would not charge them any commission, but would look to Johnson for payment by getting him to advance the price above that amount, the defendant to take for his pay whatever amount Johnson would give for the land above \$12,600 and said use of the farm; that thereupon the plaintiff and her husband executed a written instrument, set out. In this the plaintiff agreed to sell her said farm to said Johnson for \$12,600 cash and the privilege of using the farm till March 1st, 1883, she to give the purchaser one-third of the wheat and corn growing or to be grown on the place, and she to have all other products of the farm and the rent of a tenant house on the place, the purchaser to pay the November instalment of taxes on the land, and she to pay insurance for his benefit on the house in which she lived, until March 1st, 1883, and to furnish a complete abstract of title, and a warranty deed was to be made to Johnson as soon as said consideration was given; this contract to be void unless complied with by Johnson within five days.

In this writing nothing was said about the defendant's compensation, and it was alleged in the pleading that the terms of the agreement in relation thereto were not reduced to writing, but were left in parol. It was alleged that this agreement was delivered to the defendant with a deed executed by the plaintiff and her husband conveying said real estate to said Johnson, the consideration being therein expressed as \$14,000, it being expressly understood that if the defendant could secure such use of the farm and more than \$12,600 he was to retain the surplus over that amount as commission or compensation, and that if he could not obtain any greater price, he was to receive no pay from the plaintiff; that he did effect a sale to Johnson within five days, for \$14,000, with privilege to the plaintiff to retain the use of the

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farm as aforesaid; that he delivered the deed to Johnson and received from him \$14,000 in cash, of which amount he paid the plaintiff \$12,600, and he retained the balance, \$1,400 for his compensation; and he denied all allegations of fraud in said paragraphs of the complaint.

In the third paragraph of answer, also addressed to the first and third paragraphs of the complaint, the defendant alleged, in effect, that it was agreed between the plaintiff and the defendant that the latter's employment under said appointment of January 30th, 1882, should be cancelled and no longer binding on either of the parties thereto; that afterward the plaintiff and the defendant made a parol agreement stated, being the same as alleged in the second paragraph of answer, and that the plaintiff executed a written memorandum, made an exhibit, being the written offer to sell to Johnson set forth in said second paragraph; that the defendant made the sale to Johnson, under the agreement last mentioned, and fully accounted to her for the purchase-money to be received by her, and paid the same to her and fully complied with the terms of said parol agreement; and the defendant denied having deceived or defrauded the plaintiff.

The plaintiff replied to the second and third paragraphs of answer, first by general denial, and second by alleging, in substance, that no change was made in the contract set forth in the complaint, as alleged in the answer, nor was his employment thereunder ever cancelled or withdrawn by her, as alleged in the answer, though she urged and insisted that the defendant should sell for more than \$14,000, if it could be done; that while matters were in this shape the defendant contracted and agreed on a sale of said farm with said Johnson, for more than \$14,000, in this, that it was agreed that in addition to said sum the plaintiff should have for said farm the right to use and occupy it until March, 1883, and should have all the fruits, all of a portion of the crops, and two-thirds of the remainder thereof for the year 1882, Johnson insisting, however, that he would pay all said sum of

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\$14,000 in cash, instead of a part down and a part on time, the defendant agreeing for the plaintiff that she would accept such whole sum in cash, as she had often told him she would do, if the defendant should find a cash buyer; that soon after the defendant had so made such contract with Johnson, the former called upon the plaintiff and her husband, and, in order to defraud her, falsely and fraudulently represented that he had made great efforts to sell said farm, and had been unable to find a purchaser for \$14,000; that it could not be sold at that amount; that he had a man in view, said Johnson; that though he would not give \$14,000 for the farm, defendant thought that, through an influence he could bring to bear, he could induce said Johnson to give \$12,600 in cash and the right to the plaintiff to occupy the farm till March, 1883, and to have all of the fruits, all of a part of the crops, and two-thirds of the other crops raised in 1882; that defendant expressed himself as doubtful whether Johnson could be induced to do so much, and said that if the plaintiff concluded to accept such terms, the sale should be closed at once, as one of Johnson's daughters and others were opposing his buying the farm, and that, in order to show said Johnson that defendant had authority to accept such an offer and to close up such sale, it was necessary for the plaintiff and her husband to execute a paper stating that they would sell the farm for such consideration, and to make and acknowledge a deed to said Johnson for the farm, and place it in the defendant's hands to be delivered on said Johnson's paying said sum of \$12,600. It was further alleged that the plaintiff, relying upon and believing all the defendant's said statements, and having confidence in him as her agent, she and her husband executed the paper such as the defendant wished them to execute, being said paper referred to and exhibited with the answer, and signed and acknowledged and placed in the defendant's hands a warranty deed for said farm to said Johnson; that a day or two thereafter the defendant returned, and falsely and fraudulently represented to her that Johnson

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would only give said \$12,600 and the use of the farm, the fruit, and part of the crops, as he had before stated, and that he, the defendant, had accepted such offer, only in addition thereto inducing said Johnson to pay his commission of \$350; that the defendant paid to her in cash \$12,600, and she, relying upon his honesty and believing his representations true, accepted said sum without objection; that said paper so filed with said two paragraphs of answer, and the making of said deed, and the acceptance of said sum of \$12,600, were procured by the fraud and false representations of the defendant.

A demurrer to the second paragraph of reply was overruled.

There was a trial by jury, the verdict being for the plaintiff, her damages being assessed at \$1,050. A motion for a new trial was made by the defendant, and was overruled, and judgment was rendered on the verdict.

The appellant's counsel contend that while the second paragraph of the reply may be good as to the second paragraph of answer, it is not sufficient to meet all the material allegations of the third paragraph of answer; that it failed to deny the alleged abrogation of the original contract of January 30th, 1882, and failed to deny or refer to the "parol" contract set up in the third paragraph of answer, under which the defendant claimed therein to have made the sale; that the showing of fraud in the reply applies by express reference to the written contract of April, being said written offer to sell to Johnson. It is therefore insisted that the reply being bad as to one of the paragraphs of answer to which it was directed, it must be held bad on demurrer. But the reply is not susceptible of such construction. It was alleged therein that no change was ever made in the contract of January 30th, 1882, as alleged in said paragraphs of answer, and that the defendant's employment by the plaintiff to sell said farm was never cancelled or withdrawn by her as alleged in said paragraphs of answer; and the contract of April alleged in answer was not shown by either paragraph of the answer to be

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wholly oral or wholly written, but the allegations relating to it were substantially to the same effect in both of the paragraphs to which the reply was addressed, it being alleged in both to have been written except so far as it related to the compensation of the defendant; and the reply sufficiently responded to all that was alleged in either paragraph in regard to the transaction of April, as a part of which the memorandum was executed, and showed that transaction to be fraudulent on the part of the defendant. No other objection is suggested against the reply, and we find no error in the overruling of the demurrer thereto.

Counsel have discussed certain instructions given to the jury, others asked by the appellant and refused, and others asked by him and given with modifications.

We do not find it necessary to take space to set out these instructions. The objections of counsel to the action of the court may be disposed of by saying: *First.* That if instructions given to the jury, taken as a whole, express the law applicable to the case, without material contradiction, the judgment will not be reversed because some one instruction, if considered by itself, might be capable of an application which would ignore a material question involved in the issues. *Second.* That an appellant can not complain of an inconsistency in the instructions to the jury caused by the giving of instructions asked by himself, which present a theory different from that contained in other instructions given which correctly state the law, he, in such case, being himself responsible for the inconsistency. *Third.* That, looking to the terms of the written appointment of January 30th, 1882, if the defendant, acting under said appointment as the plaintiff's agent, received from Johnson an offer for the farm more advantageous to the plaintiff than that which the defendant was authorized by that appointment to accept, it was his duty to communicate such offer to the plaintiff, and not to purposely conceal it from her; and if, so acting as her agent, he effected a better trade than that which he was authorized by said ap-

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pointment to make, the plaintiff was entitled to the benefit of such trade, and she was under obligation to the defendant only for his commission.

There were some contradictions in the evidence, but taking it as a whole, it is difficult to see how the jury could have found otherwise than for the plaintiff. Even the testimony of the defendant himself showed double-dealing and the deceitful concealment from his principal of facts which common honesty required him to disclose to her. Manifestly, the verdict was based upon such a view of the evidence that errors in instructions, if there were such, would not justify us in disturbing the result reached.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed March 12, 1885; petition for a rehearing overruled May 14, 1885.

101	551
126	279
127	230

No. 12,067.

THE BOARD OF COMMISSIONERS OF BENTON COUNTY v.
HARMAN.

SHERIFF.—*Compensation for Keeping Jail.*—Beyond the compensation fixed by statute for boarding, receiving and discharging prisoners, a sheriff is not entitled to pay for services in keeping the county jail.

SAME.—*Not Liable for Rent for Jail Residence.*—A sheriff is not bound to pay rent for the part of the jail building occupied by him as a residence.

From the Benton Circuit Court.

D. E. Straight, for appellant.

D. Fraser, for appellee.

ELLIOTT, J.—The facts were specially found by the court and conclusions of law stated. Two of the conclusions of law exhibit the principal questions in the case, as the others are repetitions of the same matter expressed in a little different form of words. The conclusions of law to which we refer are these:

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"*Fifth.* The plaintiff, as sheriff of Benton county, has a legal demand against the defendant, the board of commissioners, for the reasonable value of the service and labor necessary to the proper keeping of the jail and the prisoners committed thereto during the time it was kept by him.

"*Sixth.* That the plaintiff is not liable to the defendant for rent for the use and occupation of any part of the jail building, or of the residence included therein, during the time it was occupied by him as sheriff of said county and keeper of the jail."

The first of these conclusions is erroneous; a sheriff is not entitled to pay for services in keeping the jail. The compensation fixed by statute for boarding, receiving and discharging prisoners, covers and embraces the services of the sheriff in maintaining and caring for the jail and the prisoners. We have repeatedly held that an officer can not successfully claim compensation for services unless there is a statute providing that he shall receive remuneration. *Board, etc., v. Gresham, ante*, p. 53; *Bynum v. Board, etc.*, 100 Ind. 90; *Wright v. Board, etc.*, 98 Ind. 88; *Moon v. Board, etc.*, 97 Ind. 176; *Donaldson v. Board, etc.*, 92 Ind. 80.

In thus holding, we have but followed the settled rule of the common law. *Graham v. Grill*, 2 M. & S. 294; *Dew v. Parsons*, 1 Chitty, 295; *Woodgate v. Knatchbull*, 2 T. R. 148; *Rex v. Jethewell*, Parker (Exch.) 177; *Lane v. Sewell*, 1 Chitty, 175; *Slater v. Hames*, 7 M. & W. 413; *Baker v. Davenport*, 8 D. & R. 606.

The sixth conclusion of law is correct. The sheriff is not bound to pay rent for the part of the jail building occupied by him as a residence.

Judgment reversed, with instructions to re-state conclusions of law, and to render judgment thereon in favor of the appellant.

Filed May 2, 1885.

Allen et al. v. The Board of Commissioners of Clinton County.

No. 11,843.

ALLEN ET AL. v. THE BOARD OF COMMISSIONERS OF CLINTON COUNTY.

FREE TURNPIKE.—*Subscriptions and Donations.*—*Statute Construed.*—Under the provisions of section 5101, R. S. 1881, the board of commissioners of a county has power to receive subscriptions and donations in money or property, real or personal, to be applied to the construction or improvement of a free turnpike road; and such a subscription is not invalid because it is without date.

PLEADING.—*Complaint.*—*Demurrer.*—Where such a donation, by the terms of the written subscription, is to be due and payable when the road is completed, the complaint of the county board for the collection of such donation is not bad on demurrer, because it fails to allege that the subscription was delivered by the defendants or accepted by the plaintiff, or to aver that before the commencement of the action any demand was made on the defendants for the amount of their donation, or that they had notice of the completion of the work.

PRACTICE.—*Weight of Evidence.*—*Supreme Court.*—The finding and judgment of the trial court will not be disturbed by the Supreme Court on the weight of the evidence.

From the Clinton Circuit Court.

J. N. Sims, for appellants.

T. H. Palmer, for appellee.

Howk, J.—This was a suit by the appellee against the appellants, David F. Allen and Edward Allen, partners under the firm name of D. F. Allen & Bro., upon a written instrument executed by them in their firm name to the appellee, of which instrument the following is a copy :

"We, the subscribers, agree to give the sums set opposite our names, as a donation to be paid to the commissioners of Clinton county, Indiana, to be used for the payment of the cost of the construction of the Frankfort and Thorntown Gravel Road (so named). The sum total of said donation to be deducted from the sum total of the cost of said road, the remainder to be paid by taxation as provided by law; the donations above named to be due and payable when said road is completed to the line dividing Boone and Clinton counties.

"(Signed)

D. F. ALLEN & BRO. \$250."

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In its complaint the appellee alleged that, in January, 1880, divers citizens of Clinton county were interested in the construction of a free gravel road, then and there known as the Frankfort and Thorntown Gravel Road; that such citizens desired that such road should be constructed pursuant to and in accordance with the requirements of the act of March 3d, 1877, then in force, providing for the construction of free gravel roads; that such road was located wholly within Clinton county, and that in order to induce the land-owners in the vicinity of such road to petition the county board, as provided in such act, to construct such road, the written subscription, of which the above is a copy, was executed by the appellants as aforesaid. It was further alleged that a proper petition signed by the requisite number of land-owners, whose lands would be assessed for the cost of the improvement, was presented to the county board praying for the construction of such free gravel road; and that such proceedings were duly had on such petition as that afterwards, and before the commencement of this suit, the aforesaid free gravel road was fully made and completed, in accordance with the statute; that on the first day of May, 1880, the aforesaid written subscription was filed with the appellee for its use and benefit, and for the benefit of those whose lands were assessed for the construction of such road; that appellee had caused such road to be fully constructed and completed as provided for in such written subscription, and had fully performed all the conditions upon which such subscription was made; but that the appellants had failed and refused to pay their said subscription, though often requested so to do, to appellee's damages in the sum of three hundred dollars. Wherefore, etc.

The appellants jointly demurred to appellee's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled by the court, and the appellant excepted, and has here assigned such ruling as error.

A number of objections to the sufficiency of the complaint

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are urged by appellants' counsel, and these we will briefly notice. It is objected that the written subscription is without date, but it certainly was not invalid on that ground. In section 5101, R. S. 1881, in force since March 3d, 1877, it is provided that "the board of commissioners shall have power to receive subscriptions and donations in money or property, real or personal, which shall be applied to the construction or improvement of such road." Counsel claims that the complaint is bad, because it fails to allege that the subscription was ever delivered by the appellants to the appellee, or that it ever accepted or acted upon such subscription. It is stated in the complaint that on the 1st day of May, 1880, the subscription of the appellants was filed with the appellee, for its use and benefit. As the appellee had the power, under the statute, to receive such subscription, it will be presumed, in the absence of any showing to the contrary, that it did receive and accept the subscription, and that it has acted thereon is sufficiently shown, we think, by the pendency of this action. But counsel says that the appellee was not in session on the 1st day of May, 1880. That fact, if it were the fact, is not apparent on the face of the complaint; but if the fact were apparent, we might well assume that the appellee was lawfully in regular session several times between May 1st, 1880, and the day of the commencement of this suit, on August 15th, 1881. Appellants' counsel further claims that the complaint is bad, because it "fails to show that prior to the commencement of the action any demand was made on the defendants, or that they had notice of the completion of the work." The fact that a demand was made on the appellants before the commencement of this suit is sufficiently implied, we think, in the averment that they had refused to pay their subscription, to withstand their demurrer to the complaint for the want of facts. A refusal to pay implies or presupposes an antecedent demand for payment. The completion of a free public highway is a fact of such general notoriety as to dispense with any formal notice thereof. Besides, there was no

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stipulation in the appellants' subscription that they should be notified of the completion of the road or for any formal demand of payment; and, in the absence of such a stipulation, it would seem that neither notice nor demand was necessary. *Van Riper v. American Cent. Ins. Co.*, 60 Ind. 123.

By the terms of the subscription the sum donated by the appellants became due and payable when the road was completed. It was averred in the complaint that the road was fully completed, as provided for in the written subscription, and this fact was admitted to be true by appellants' demurrer. Under the averments of the complaint, therefore, the money sued for was alleged and admitted to be due and payable. As a general rule, money due may be sued for without any previous demand therefor. *School Town of Princeton v. Gebhart*, 61 Ind. 187; *Excelsior Mut. Aid Ass'n v. Riddle*, 91 Ind. 84.

The complaint was certainly sufficient on demurrer, and if there were any defects therein, they were such as could be reached only by motion to make more specific. The court did not err in overruling the demurrer to the complaint.

The cause was put at issue and tried by the court, the Honorable Pierce Norton presiding as special judge, and a finding was made in favor of the appellee, and against the appellants, in the full amount of their subscription. Over their motion for a new trial, the court rendered judgment upon and in accordance with its finding.

The overruling of their motion for a new trial is the only other error assigned by the appellants in this court.

The finding of the court, we think, is fully sustained by the evidence in the record, and, certainly, it was not contrary to law. The appellants assigned as causes for a new trial a number of alleged errors of law occurring at the trial, in the admission of evidence offered by appellee, over their objections and exceptions. We have examined this evidence, and carefully considered the appellants' objections to the admission thereof. So far as we can see, no useful purpose would be subserved by our setting out in this opinion the various

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items of evidence objected to by the appellants, or by our commenting at length upon their objections. It will suffice for us to say, as we do, that the evidence complained of seems to us to have been pertinent, relevant and competent, and that no error was committed by the trial court in overruling the appellants' objections to the admission of such evidence.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed April 28, 1885.

No. 11,602.

BURNS ET AL. v. SIMMONS ET AL.

HIGHWAYS.—*Petition.*—*Amendment.*—It is within the discretion of the circuit court to permit amendments to be made to the petition in highway cases, and the Supreme Court will not interfere unless there is an abuse of discretion.

SAME.—*Discretionary Power of Circuit Court.*—It is not an abuse of the discretionary power of the circuit court to permit an amendment to be made changing in a slight degree the line of a proposed highway, in a case where the change does not affect the interests of persons not in court.

From the Shelby Circuit Court.

B. F. Love, A. Major, H. C. Morrison, E. K. Adams and L. J. Hackney, for appellants.

T. B. Adams, L. T. Michener and G. W. Cooper, for appellees.

ELLIOTT, J.—The circuit court permitted the appellees to amend the petition, which they had filed before the commissioners, praying for the establishment of a highway, and the principal question in the case arises upon that ruling.

It is settled by our decisions that the circuit court may permit amendments to be made to petitions in highway cases. *Hedrick v. Hedrick*, 55 Ind. 78; *Goodwin v. Smith*, 72 Ind. 113 (37 Am. R. 144); *Porter v. Stout*, 73 Ind. 3; *Green v. Elliott*, 86 Ind. 53, see opinion 63. In *Coolman v. Fleming*, 82 Ind. 117, it was held that a petition in a drainage case

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134	485
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151	74
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155	858

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might be amended on appeal to the circuit court even as to a jurisdictional matter, and, as sustaining this doctrine, the court cited the case of *Jackson v. Ashton*, 10 Peters, 480.

We assume, on the strength of these decisions, that the circuit court had authority to permit an amendment of the petition, and we proceed to inquire whether there was any abuse of discretion in permitting the appellees to amend their petition in the manner in which they did. Although there is authority to permit amendments, and although the authority is in a measure a discretionary one, still it is not unlimited, nor is it beyond review. It is not easy to lay down a general rule upon this subject, for each case must depend upon its own particular facts, and to them the appellate court must look to ascertain whether there was not an error of judgment, or an abuse of discretion. The amendment in this case consisted in changing the description of the line of the proposed highway. In the original petition the description reads thus: "Commencing at the southeast corner of the southwest quarter of section five, township ten north, of range seven east, in said county, running thence west on the south line of sections five and six in said township and range, three-quarters of a mile, to the southwest corner of the east half of the southeast quarter of said section six; thence south forty-eight rods to a corner stone, there intersecting the road leading through St. Louis to Hope." The description in the amended petition is as follows: "Commencing at the southeast corner of the southwest quarter of section five, township ten north, of range seven east, in said county, running thence west on the south line of section five of said township and range, to a point fifteen feet east of the northeast corner of a school lot owned by Haw Creek school township, in said county; thence northwest at an angle of nearly forty-five degrees to a point fourteen and one-half feet north of the northeast corner of said school lot; thence west parallel with said section line to a point fourteen and one-half feet north

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of the northwest corner of said school lot; thence southwest at an angle of nearly forty-five degrees, to a point fifteen feet west of the northwest corner of said school lot and on the south line of section six, in said township and range; thence west to the southwest corner of the east half of the southeast quarter of said section six; thence south forty-eight rods to a corner stone, there intersecting the road leading through St. Louis to Hope." It appears from a comparison of the two descriptions that the only effect of the amendment was to change the line of the proposed highway about fourteen feet north for the purpose of avoiding interference with a school lot, and that this divergence from the line described in the original petition was only for a short distance, and that the change only affected the lands of the parties before the court. We can not say that there was any available error in permitting this amendment. If it had affected lands owned by persons not before the court upon the original petition, we should have had a different question, but as no other lands were affected, we can not see that any substantial injury was done to any one by the amendment of the petition.

It is contended by the appellants that the viewers must lay out the highway, and that neither the board of commissioners, nor the circuit court on appeal, has authority to make any change in the line laid out by the viewers. The decisions are against the position that the report of the viewers controls in the circuit court. There are a great number of decisions to the effect that an appeal to the circuit court brings up the case for trial *de novo*, and that the reports of the viewers and reviewers cease to be effective. *Clift v. Brown*, 95 Ind. 53; *Cox v. Lindley*, 80 Ind. 327; *Grimwood v. Macke*, 79 Ind. 100; *Doctor v. Hartman*, 74 Ind. 221; *Corey v. Swagger*, 74 Ind. 211, *vide* p. 214; *Turley v. Oldham*, 68 Ind. 114.

Judgment affirmed.

Filed May 14, 1885.

 Morris v. The State, *ex rel.* Brown.

No. 9605.

MORRIS v. THE STATE, EX REL. BROWN.

101	560
148	258

EVIDENCE.—*Parol Evidence to Explain Record.*—*Plea in Abatement.*—*Pending Prior Action.*—*Variance.*—Where the pendency of a prior action is pleaded in abatement, and the record, which is offered to sustain the plea, shows a difference in the names of the plaintiffs in the two actions, parol evidence to explain the variance is not admissible without an averment in the plea that such plaintiffs are one and the same.

SAME.—*Admissions.*—*Instruction.*—An instruction, to the effect that oral admissions by a party should be received with great caution, because the witness may not have correctly understood them or may not have recollected them, is erroneous.

From the Henry Circuit Court.

J. Brown, W. A. Brown, C. D. Morgan and J. M. Morris,
for appellant.

J. H. Mellett, E. H. Bundy, S. Griffin, J. B. Julian and J. F. Julian, for appellee.

MITCHELL, J.—On complaint of the relatrix the appellant was adjudged the father of a bastard child of which she was alleged to be pregnant.

It is assigned for error that the court overruled appellant's motion for a new trial, and under this assignment three points are discussed by counsel :

1. That the finding of the jury is not sustained by the evidence.
2. That the court erred in excluding the record of a prior action pending for the same cause.
3. That the court erred in giving certain instructions to the jury.

The relatrix seems to have been a married woman, living apart from her husband at the time the child was alleged to have been begotten. By her own admissions she was keeping company, somewhat promiscuously, with other men. The appellant denies persistently that he ever had any relations with her of any kind.

Morris v. The State, *ex rel.* Brown.

Another testified to having had frequent intercourse with her about the time she became pregnant.

It was shown that she had made contradictory statements with respect to the paternity of the child, and there was evidence tending to show that her general reputation was bad. There was also evidence tending to show that before she became pregnant of the child whose paternity is in dispute, she sustained a good reputation.

She testified to a number of acts of intercourse with the appellant, and asseverated that he was the father of the child. The jury believed her testimony, and returned a verdict accordingly.

The most that we can say is that upon the evidence as it appears on paper, we might not be able to say who was the father of the child, but as the jury, with the parties before them, found that it was begotten by the appellant, we can not say that the finding is not supported by evidence.

It appears from the record that this proceeding was commenced before Justice Hall on the 11th day of February, 1881. When brought before the justice, the defendant filed a plea in abatement, alleging therein that at the time this proceeding was commenced another proceeding was pending before the same justice for the same cause. In the circuit court the plea was re-filed and held good on demurrer.

At the trial the defendant offered in evidence the papers and docket entries in a case commenced before the same justice on February 7th, 1881, by Christina Riddle against him.

In that case, Christina Riddle preferred against the defendant, and had him arrested upon, a charge in all respects similar to that preferred by Christina Brown on the 11th of February. He offered to prove at the trial below that Christina Riddle and Christina Brown were one and the same person; and he also offered to prove that the proceedings in the first case were pending when he was arrested on the warrant in the second.

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We think it sufficient to say that without an averment in the answer that the prior action was commenced by Christina Brown in the name of Christina Riddle, and that they were one and the same person, the evidence was not admissible. The record as offered did not sustain the plea, and parol evidence was not admissible to explain the variance without some appropriate averment which would lay the basis for such evidence. Moreover, it was not proposed to prove that the action was pending at the time the plea was filed, and the docket entry which was offered showed that the first suit was dismissed on the same day on which the last was commenced. *Moore v. Kessler*, 59 Ind. 152.

The court gave the following instruction, which was accepted to by the appellant: "Where it is sought to show that admissions have been made by a party to this cause, the rule of law is that you ought to receive such admissions with great caution. Among the reasons given why you should exercise caution are, that the witness may not have correctly understood the admission, or may not have recollected them; a change of words may alter the meaning, or words may have been omitted. For these and other reasons the law requires you to exercise caution in receiving the evidence of admissions. But an admission when clearly made and satisfactorily proven is a high order of evidence."

The appellant had given evidence tending to prove admissions on the part of the relatrix, that another person was the father of the child, and this instruction was applicable to such evidence. An instruction in substantially the same words has been condemned in the following cases: *Newman v. Hazelrigg*, 96 Ind. 73; *Finch v. Bergins*, 89 Ind. 360; *Garfield v. State*, 74 Ind. 60; *Davis v. Hardy*, 76 Ind. 272.

For the error in giving this instruction the judgment is reversed, with costs.

Filed May 14, 1885.

Clark *et al.* v. Shaw *et al.*

No. 9864.

CLARK ET AL. v. SHAW ET AL.

PRACTICE.—Injunction.—*Omission from Record of Motion to Dissolve.*—*Supreme Court.*—In the absence from the record of a motion to dissolve an injunction, the Supreme Court will not review the ruling of the trial court thereon.

SAME.—Discretion of Court.—Where a demurrer to a complaint for an injunction, and a motion to dissolve the temporary injunction, are pending at the same time, it is discretionary with the trial court as to which it will first rule upon, and the exercise of this discretion will not be reviewed in the Supreme Court.

From the Lake Circuit Court.

M. Wood and T. J. Wood, for appellants.

Howk, J.—The appellants, the plaintiffs below, brought an action in the circuit court to have a certain judgment, which the appellee Shaw recovered against them and others in the court of common pleas of Lake county, declared satisfied. Upon the trial of that action, judgment was rendered against the appellants. From this judgment they appealed to this court, where, at the November term, 1881, the judgment below was in all things affirmed. *Clark v. Shaw*, 79 Ind. 164.

Pending such appeal, the appellants instituted this suit to enjoin the collection of the judgment, which they had sought to have declared satisfied in their former suit. The judge of the circuit court, in vacation, granted the appellants a temporary injunction as prayed for in their complaint. At the next term of the court, in September, 1880, the appellees appeared and demurred to the complaint for an injunction, upon the ground that it did not state facts sufficient to constitute a cause of action. The record does not show that the court ruled, in any way, upon this demurrer. At the February term, 1881, of the court, the order-book entries copied in the transcript show that the appellees filed their motion to dissolve the injunction, and that this motion was sustained

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by the court, "to which ruling of the court the plaintiffs except, and say they will not further amend their petition." Then follows the judgment of the court "that the defendants recover of the plaintiffs all costs of this action," from which judgment this appeal is now prosecuted.

The first error assigned by the appellants is that the court erred in sustaining the appellees' motion to dissolve the temporary injunction. This error is not shown, we think, by the transcript before us, for the reason that the appellees' motion was not made a part of the record of this cause, either by a bill of exceptions or an order of court. The motion was apparently in writing, and it may have been supported by affidavits. In the absence of the motion from the record, we can not know that the court erred in sustaining it, and in such case we must presume that no error was committed. The record must show error, and in the absence of the motion, upon which, and the ruling thereon, the error is predicated, this can not be done.

Appellants also claim that the court erred in ruling upon the motion to dissolve the injunction, before passing upon the demurrer previously filed to their complaint. This matter was entirely within the discretion of the circuit court, and its exercise of this discretion will not be reviewed in this court. *Grand Rapids, etc., R. R. Co. v. McAnnally*, 98 Ind. 412.

We find no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed April 29, 1885.

No. 12,156.

HEDDERICH v. THE STATE.

CONSTITUTIONAL LAW.—*Statutes.*—*Natural Right.*—Whether a statute encroaches upon natural rights of the citizen is a legislative and not a judicial question, and courts can not overthrow a statute upon the ground that it encroaches on natural rights.

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147 634

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148 348

101 564
156 106
156 188

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SAME.—Legislative Power.—The only limitations upon the power of the Legislature are those imposed by the State Constitution, the Federal Constitution and the treaties and acts of Congress adopted and enacted under it.

SAME.—Title of Acts of Legislature.—The title, "An act concerning public offences and their punishment," is sufficiently comprehensive to include all crimes and misdemeanors.

SAME.—Intoxicating Liquors.—License.—The statute prohibiting the sale of intoxicating liquor between the hours of eleven o'clock P. M., and five o'clock A. M., is constitutional, and applies to licensed retailers of intoxicating liquor.

STATUTES.—Construction.—Judicial Knowledge.—Abbreviations.—Courts judicially know the meaning of abbreviations ordinarily employed and the usual method of computing time.

SAME.—Time, Computation of.—Time is reckoned by following the hours forward, and is so reckoned as to make the period a consecutive one, unless there is something in the statute indicating a different method. The provision, "between the hours of eleven o'clock P. M. and five o'clock A. M.," means the period intervening between eleven o'clock night and five o'clock morning of the succeeding day.

SAME.—Criminal Law.—A provision in a statute, prescribing a penalty of fine and imprisonment against one who does a designated act, is a sufficient declaration that the prohibited act is unlawful.

SAME.—Definition of Crime.—It is sufficient if an offence is so defined as to convey to the mind of a person of ordinary intelligence adequate information of the evil intended to be prohibited.

From the Marion Criminal Court.

D. Turpie, W. D. Bynum, A. T. Beck and J. N. Scott, for appellant.

F. T. Hord, Attorney General, and W. B. Hord, for the State.

ELLIOTT, J.—The indictment upon which rests the judgment of conviction from which this appeal is prosecuted charges the appellant with the offence of selling a gill of intoxicating liquor to be drank as a beverage, between the hours of eleven o'clock P. M., of the 21st day of January, 1885, and five o'clock A. M., of the succeeding morning.

The validity of the statute prohibiting the sale of intoxicating liquor between the hours of eleven o'clock P. M. and five o'clock A. M. is assailed upon the ground that the Legislature does not possess the power to enact such a law; but

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0161	480
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163	514

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no provision of the Constitution has been pointed out which denies to the Legislature the power exercised in the enactment of this statute. In an argument of signal ability counsel contend that in the enactment of the statute the Legislature transcended its constitutional powers, because the statute encroaches upon the natural rights of the citizen. The argument finds no support from authority and has none in principle. Whether a statute is or is not a reasonable one, is a legislative, and not a judicial, question. Whether a statute does, or does not, unjustly deprive the citizen of natural rights, is a question for the Legislature, and not for the courts. There is no certain standard for determining what are, or are not, the natural rights of the citizen. The Legislature is just as capable of determining the question as the courts. Men's opinions as to what constitute natural rights greatly differ, and if courts should assume the function of revising the acts of the Legislature on the ground that they invaded natural rights, a conflict would arise which could never end, for there is no standard by which the question could be finally determined. But there can be no such unseemly conflict, for there is only one standard for determining the validity of statutes, and that is supplied by the Constitution. In *Pittsburgh, etc., R. W. Co. v. Brown*, 67 Ind. 45 (33 Am. R. 73), WORDEN, C. J., said: "If the law is unconstitutional, the courts should hold it void, but upon no other ground can it be disregarded." This court quoted with approval, in *Welling v. Merrill*, 52 Ind. 350, from the able opinion in *Sharpless v. Mayor, etc.*, 21 Pa. St. 147, the following: "We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we can not do this." The court, in speaking of an argument of a similar character to that advanced in this case, said: "That, however, is not a subject for judicial cognizance; it is not for the court to say that a constitutional law

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shall not have effect, because it is in the judgment of the court unreasonable." *Barton v. McWhinney*, 85 Ind. 481. One of the ablest of our judges long since said: "The legislative authority of this State is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by our own Constitution, by the Federal Constitution, and by the laws and treaties made under it." *Beauchamp v. State*, 6 Blackf. 299. This doctrine has been approved time and again. *Doe v. Douglass*, 8 Blackf. 10; *Maize v. State*, 4 Ind. 342; *Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185, *vide pp.* 198, 202; *Fry v. State*, 63 Ind. 552, *vide p.* 559; *McComas v. Krug*, 81 Ind. 327 (42 Am. R. 135); *Campbell v. Dwiggins*, 83 Ind. 473, *vide p.* 480; *Mount v. State, ex rel.*, 90 Ind. 29 (46 Am. R. 192).

The question here is not as to the power of the Legislature to absolutely prohibit the sale of intoxicating liquors, but as to the power to regulate the traffic. Counsel have not cited us to any provision of the Constitution denying the power, nor have they brought to our attention a single authority construing the Constitution as they claim it should be construed.

It is clear to our minds, both upon reason and authority, that the statute is a valid exercise of the police power vested in the Legislature. In *Morris v. State*, 47 Ind. 503, it was assumed, without question, that the statute restricting the sale of liquor between prescribed hours was valid, and that it was within the power of the Legislature to prohibit the sale on Sunday, on election days, and on legal holidays. We have a great many cases scattered through our reports holding statutes prohibiting sales on such days valid, and the principle is the same in those cases as in this, for the undergirding principle of all these cases is, that the Legislature may regulate the retail liquor traffic. The statutes and decisions upon this subject were reviewed in *Harrison v. Lockhart*, 25 Ind. 112, and it was said: "It will be seen, from this rapid view, that it has not been the policy, either in England or in this country,

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to encourage the traffic in intoxicating liquor; but that, in this country, the whole action of the legislative power has been uniformly to limit, restrict, or absolutely prohibit the traffic. With us, from the time almost of our earliest territorial existence to the present moment, that policy has been pursued." The conclusion reached in the case cited was approved in *McAlister v. Howell*, 42 Ind. 15. It is not questioned in any of our cases, that the Legislature may regulate the traffic. The farthest that any of the decisions go is to deny the right to absolutely prohibit the manufacture and sale of intoxicating liquors. If we should now deny this power to regulate the retail traffic, we should depart from a long and well established course, and enter upon one not marked out by any principles nor lighted by any decisions. The adjudged cases, so far as we have been able to ascertain, uniformly agree that the Legislature has power to regulate the traffic by prohibiting sales on holidays and election days, and by prescribing the hours within which sales may be made. Judge Cooley cites many cases asserting the power to enact such regulations. Cooley Const. Lim. (5th ed.) 720, n. In the case of *Bertholf v. O'Reilly*, 74 N. Y. 509 (30 Am. R. 323), the court said: "The right of the State to regulate the traffic in intoxicating liquors, within its limits, has been exercised from the foundation of the government, and is not open to question. The State may prescribe the persons by whom, and the conditions under which, the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic and individuals against injuries committed by intoxicated persons under the influence of or resulting from their intoxication." In the cases of *Crone v. State*, 49 Ind. 538, *Layton v. State*, 49 Ind. 229, and *Beardsley v. State*, 49 Ind. 240, the constitutionality of the statute was not questioned, although there was much diversity of opinion upon other points, and separate opinions were filed by four of the members of the court.

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The title of the statute which contains the provision that this indictment is founded upon is, "An act concerning public offences and their punishment," and we have no doubt that the title is sufficiently comprehensive to include all offences of a public nature. If it does not include all, it does not include any, and if this be true, then it results that we have no general statute defining criminal offences, and the Legislature and the courts have gone far astray in assuming that a valid statute existed; but this is not true, for the title is sufficient under our constitutional requirements.

It is true that the act defining the offence here charged applies to licensed venders, but this does not affect its validity, for a license is not a contract; it is nothing more than the grant of a privilege, and it does not in any wise restrict the exercise of the police powers of the Legislature. *McKinney v. Town of Salem*, 77 Ind. 213. But if it were conceded that the license constituted a contract, it would not strengthen appellant's case, for it is established law that the Legislature can not by any act surrender or alienate such a sovereign power as that of the police power of the State. *McKinney v. Town of Salem, supra*; *State v. Woodward*, 89 Ind. 110 (46 Am. R. 160).

The statute reads thus: "Whoever shall sell, barter, or give away to be drunk as a beverage, any spirituous, vinous, malt or other intoxicating liquor, upon Sunday, the fourth day of July, the first day of January, the twenty-fifth day of December (commonly called Christmas day), thanksgiving day as designated by proclamation of the Governor of this State or the President of the United States, or any legal holiday; or upon the day of any election in the township, town, or city where the same may be holden; or between the hours of eleven o'clock P. M. and five o'clock A. M.,—shall be fined in any sum not more than fifty dollars nor less than ten dollars, to which may be added imprisonment in the county jail not more than sixty days nor less than ten days." Section 2098, R. S. 1881.

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The contention, that the clause "between the hours of eleven o'clock P. M. and five o'clock A. M.," only refers to Sundays, holidays, and election days, can not be maintained. The prohibition as to those days is not confined to particular hours, but extends to the entire day. The plain meaning of the statute is that no sales at all shall be made on Sundays, holidays, or election days, and that on other days sales shall not be made within the hours designated. The words of the statute are in the alternative and prescribe different offences, among them that of selling between the hours designated, and this offence is just as complete and distinct as is that of selling on Sunday, or on election days. The indefensible character of counsel's position is readily perceived when it is traced to its necessary logical results, for, conceding the position to be correct, then the statute prohibits the sale of liquor after eleven o'clock at night on Sundays, holidays and election days, but allows it to be sold at all other hours from five A. M. until eleven o'clock P. M. of those days. That the statute was never meant to produce such a result is clear, and it requires no more than a reasonable construction of the language employed to avoid that result. It is not doing violence to the language of the statute to hold that the clause quoted is an interdiction of all sales between the hours designated, and, certainly, it is but carrying into effect the intention of the Legislature to thus hold. We are bound to look to the purpose of the statute, to the necessity for its enactment, and the object it was intended to accomplish. *Hedrick v. Kramer*, 43 Ind. 362; *Bell v. Davis*, 75 Ind. 314; *Krug v. Davis*, 87 Ind. 590, *vide* p. 596. Looking to these considerations, we can not be in doubt as to the legislative intention, and giving to language its usual effect and meaning, we can not doubt that this intention is well and fully expressed.

The statute must have a reasonable construction, and a reasonable construction will make the clause, "between the hours of eleven P. M. and five o'clock A. M.," mean the period intervening between eleven o'clock night, and five o'clock

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morning of the succeeding day. Courts judicially know the meaning of the abbreviations employed, and know, also, the usual method of reckoning time. Judicial knowledge is by no means so limited as counsel's theory assumes. Courts do take notice of matters of general knowledge, and it certainly is a matter of general knowledge that the usual method of reckoning time is to follow the hours as they move forward, and to so compute the time as to make the period a consecutive one. Time is not reckoned backward, nor is it divided into separate and fragmentary parts, unless there is something indicating that the ordinary method is not to be pursued. The consecutive hours, reckoning forward in the usual and natural way, are from eleven o'clock post-meridian until five o'clock ante-meridian, and this period necessarily begins in the night and terminates in the morning. We can not do otherwise than hold that the Legislature employed the language found in the statute in its ordinary signification, and when this signification is given it there is no uncertainty, nor, indeed, even obscurity.

What the statute prohibits under penalty of fine and imprisonment is unlawful. It is not necessary that the statute should in express words declare an act to be unlawful; it is enough if it prohibits it under a penalty. Scarcely one among all the statutes defining felonies expressly declares the act forbidden to be unlawful, and no one has ever thought of questioning the validity of convictions under them; nor, for that matter, has any one until now ever questioned the validity of the section of the statute under immediate discussion so far as it defines the offence of selling on Sundays, election days, and holidays. Its validity has in scores of cases passed unchallenged by court and counsel.

It has been said many times by all the courts of the land, that statutes shall not be overthrown upon the ground that they are unconstitutional or uncertain unless there is no doubt of their infirmity. Legislative enactments are not to be lightly disregarded; it is only in clear cases that courts will

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declare them invalid. It is always with reluctance that courts strike down an enactment of the law-making power for any cause. The reasons for this rule are so obvious, and have been so often stated, that it is unnecessary to repeat them. It is not at all difficult to sustain the present statute. No one can be at a loss to ascertain its meaning, nor can any one be misled by its provisions. It regulates the retail liquor traffic, and one of the regulations is, that there shall be no sales of intoxicating liquor between the hours of eleven o'clock P. M. and five o'clock A. M. The violation of this provision is an offence, and no one who can understand the force of language can be put to doubt, nor can any one be misled or entrapped.

It is sufficient if an offence is so defined as to convey to the mind of a person of ordinary intelligence an adequate description of the evil intended to be prohibited, and it is sufficient if this intention is expressed in ordinary language without technical accuracy. Mr. Bishop says: "The language of our statute is, in the greater part, not technical in either sense above explained, but popular; to be understood, therefore, in its common, popular meanings." Bishop Statutory Crimes, section 101.

The language used in the statute before us, taken in its popular meaning, describes an offence, and so describes it that there can be neither obscurity nor confusion. The principle which here applies has been repeatedly declared and enforced by this court. *Wall v. State*, 23 Ind. 150; *State v. Craig*, 23 Ind. 185; *Burk v. State*, 27 Ind. 430; *State v. Oskins*, 28 Ind. 364; *Hood v. State*, 56 Ind. 263 (26 Am. R. 21); *Evans v. State*, 59 Ind. 563; *State v. Berdett*, 73 Ind. 185 (38 Am. R. 117).

In several of the cases cited the phraseology of the statute was substantially the same as that in the one now before us, and it was held that the offence was well defined. The resemblance between the statutes acted upon in *State v. Craig*, *supra*, and *Evans v. State*, *supra*, and that here involved, is

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very close, and the principle which those cases establish rules the present.

The trial court did not err in overruling the motion to quash, and the judgment is therefore affirmed.

Filed May 12, 1885.

No. 11,773.

KINNEY v. DODGE.

PLEADING.—*Sufficiency of Complaint.*—*Mistake of Law.*—As a general rule, the courts will afford no relief against mistakes of law; but where the complaint shows that the defendant is an attorney at law, skilled and learned in the law, and that the plaintiff's mistake of law was induced by the misrepresentations of the defendant, and was known to and taken advantage of by him, such complaint states a cause of action, good even on demurrer, and good, beyond doubt, when questioned for the first time, after verdict and judgment, in the Supreme Court.

SAME.—*Special Answer.*—*Confession and Avoidance.*—*Argumentative Denial.*—*Issue.*—Where a special or affirmative answer does not confess and avoid the plaintiff's cause of action, but alleges facts which, if true, are utterly inconsistent with the truth of material facts averred in the complaint, such answer is an argumentative denial of such material averments of the complaint, and puts them in issue, and the burden of such issue is on the plaintiff.

PRACTICE.—*Burden of Issue.*—*Open and Close.*—*Error.*—On the trial the party on whom rests the burden of the issue has the right to open and close the case to the jury, and the refusal of such right is an available error for the reversal of the judgment.

JUDGMENT.—*Statutory Lien.*—*Extension of Time.*—Under section 608, R. S. 1881, the statutory lien of all final judgments, in the Supreme and circuit courts, for the recovery of money or costs, upon real estate and chattels real liable to execution, will terminate generally at the expiration of ten years after the rendition thereof; but such statutory lien may be extended beyond the period of ten years, by appeal or injunction, by death of the judgment defendant, or by agreement of the parties entered of record. Where, therefore, the only fact alleged or proved is that more than ten years have elapsed since the rendition of the judgment, there is no error in refusing to instruct the jury that such judgment is not a lien or cloud upon the title to real estate.

101	573
137	74
101	573
148	94
101	573
156	421
101	573
163	60

Kinney v. Dodge.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellant.

R. M. Johnson and *E. G. Herr*, for appellee.

Howk, J.—In this case the appellee, Dodge, the defendant below, has assigned here as cross error, that the appellant's complaint does not state facts sufficient to constitute a cause of action. In the natural order of things, this cross error should be first considered; because, if the appellant had no cause of action against the appellee, it is certain that the judgment below should be affirmed, without regard to any intervening error. This is settled by the decisions of this court. *Fell v. Muller*, 78 Ind. 507; *Clawson v. Chicago, etc., R. W. Co.*, 95 Ind. 152.

In his complaint the appellant alleged that, on the 21st day of October, 1882, he sold and conveyed, by warranty deed, a certain lot or parcel of land, in the city of Elkhart, to the appellee, Dodge, and in part payment for such lot the appellee executed his two promissory notes, each for the sum of \$500, payable respectively in one and two years to the appellant, with eight per cent. interest from November 1st, 1881, and secured by mortgage on the lot; that appellee was an attorney at law, skilled and learned in the law, and the appellant was a farmer, and was not skilled in the law; that, on the 21st day of October, 1882, the appellant went to the appellee's office, in the city of Elkhart, to collect such first note; that appellee then informed appellant that there were certain liens and charges on such lot that were unpaid and a breach of the covenants in his deed; that the amount of such liens and charges was \$59.91; that appellant knew the appellee was skilled in the law, and supposed that he knew the facts in the matter; and that, relying wholly on the appellee's statement that such matters were liens and still unpaid, and that appellee would have to pay them and could then collect the same from appellant, the latter allowed the amount thereof to be deducted from such note, and gave up

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the note to appellee, taking from him a receipt in the words and figures following, to wit:

"Office of Henry C. Dodge, Attorney at Law, 97 Main St. :

"ELKHART, INDIANA, ——— —, 188—.

"Cost of getting Virgil Young's mortgage released . . .	\$ 2.25
"Judgment against J. T. Weaver, Oct. 30th, 1871 . . .	30.07
"Six per cent. interest on the same	19.84
"Tax certificate, 1845	2.44
"Interest at six per cent. on same	5.31

"Total \$59.91

"Received the above sum in full release to George Kinney of these claims against the property, which he deeded to me by warranty deed on October 21st, 1881; and I hereby discharge said Kinney from any further responsibility against said claims, which are a lien on the real estate mentioned in said deed of said date. October 21st, 1882.

"(Signed)

HENRY C. DODGE."

And the appellant averred that the appellee misrepresented both the law and the facts to him, and he supposed that the same were true and relied thereon; while in truth, as the appellant had since learned, all of said claims had been fully paid, and would not have been liens if they had not been paid; that such liens were paid long before that time, and the appellee well knew that, if valid, they could not be liens on such lot at that time; wherefore the appellant said that he had been defrauded out of \$59.91, and he asked judgment for \$75.

It will be observed that the sufficiency of this complaint was not questioned below by the appellee, by demurrer, by a motion to make its averments more certain and specific, or by a motion in arrest of judgment. But after verdict and judgment thereon, the appellee attacks the complaint for the first time in this court, by assigning here as error that it does not state facts sufficient to constitute a cause of action. This, of course, the appellee has the right to do under section 343,

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R. S. 1881; but there are often objections to a complaint, which will not be available to the defendant, if he do not take advantage of them at the proper time and in the proper manner. *Donellan v. Hardy*, 57 Ind. 393. It is true, as a general proposition, that misrepresentations as to matters of law merely will not afford the complaining party any cause of action. But here the complaint shows that the appellant's mistake of law was induced by the misrepresentations of the appellee, who was "an attorney at law, skilled and learned in the law." It can not be that the courts can not relieve the appellant from, nor afford him any redress for, the results of his mistake of law thus induced. *Bales v. Hunt*, 77 Ind. 355, and authorities cited. We are of opinion that the appellant's complaint stated facts sufficient to constitute a cause of action, good even upon demurrer, and good, beyond a peradventure, when questioned, as it is, after verdict and judgment, for the first time in this court.

We come now to the consideration of the only error assigned by the appellant, namely, that the court erred in overruling his motion for a new trial. Under this alleged error, the appellant's counsel first insists that the trial court erred in awarding the opening and close of the argument to the appellee. This point, we think, is well taken and must be sustained. It is true that the appellee's answer consisted of a single special or affirmative paragraph, in which there was no direct denial of any allegation of appellant's complaint. But it is also true that this answer does not confess and avoid the appellant's cause of action. The answer alleges facts, however, which, if true, are utterly inconsistent with the truth of material facts alleged in the complaint. Therefore, the answer is an argumentative denial of such material facts, and puts them in issue just as effectually as would a direct denial thereof. As to such material facts thus argumentatively denied, the appellant had the burden of the issue, and this gave him the right to open and close the case to the jury. *Rothrock v. Perkinson*, 61 Ind. 39.

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It is claimed, also, on behalf of the appellant, that the trial court erred in refusing to give the jury, at his request, the following instruction: "The court instructs you that the Weaver judgment was not a cloud upon the title to said land on October 21st, 1882, even if unpaid."

The evidence is not in the record, but the bill of exceptions recites, in accordance with the proviso in section 650, R. S. 1881, that the appellant introduced evidence tending to prove all the allegations contained in the complaint, that the court gave no instruction covering in substance the ground covered by the instruction above quoted, and that such instruction was "applicable to the evidence in the cause." The alleged error of the court in refusing the instruction quoted, therefore, is properly presented by the record and must be considered. It may be conceded, perhaps, that the record shows the Weaver judgment to have been more than ten years old at the time the appellant was induced, as he claims, by the appellee's misrepresentations of both the law and the facts, to allow him a credit on his note for the amount of such judgment and interest. If it could be said that the statutory lien of a judgment terminated, in all cases and in any event, at the expiration of ten years from the time of its rendition, then the question as to whether or not a judgment, unsatisfied of record, which has ceased to be a lien on real estate by lapse of time, is a cloud upon the title to such real estate, might possibly be presented for our decision by the record of this cause. But, under section 608, R. S. 1881, the statutory lien of a judgment may be extended beyond the period of ten years by appeal or injunction, by death of the judgment defendant, or by agreement of the parties entered of record; and the record of this cause fails to show that the lien of the Weaver judgment had not been extended in either of these modes. We think, therefore, that the error of the court in refusing to give the instruction above quoted is not shown by the record in such manner as to present for our decision

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the question discussed by appellant's counsel, that the Weaver judgment, by reason of the lapse of ten years after its rendition, although unsatisfied of record, was not a cloud upon the title to the lot conveyed by appellant to appellee. This question we neither consider nor decide.

It will be readily seen that there is no conflict between what we have said in this case, in relation to the effect of the proviso in section 650, R. S. 1881, and what was said by the court in the previous cases of *Drinkout v. Eagle Machine Works*, 90 Ind. 423, and *Rozell v. City of Anderson*, 91 Ind. 591. In the cases cited the instructions complained of had been given, and it was held that the proviso in section 650, in such a case, would be of little service, as it did not change the previous practice in this court; but we also held, as we hold in this case, that such proviso would be serviceable where the instruction had been refused below, and such refusal was complained of here as error.

For the error of the court in awarding the opening and close of the case to the appellee the motion for a new trial ought to have been sustained.

The judgment is reversed, with costs, and the cause is remanded for a new trial.

Filed April 30, 1885.

No. 11,789.

SOHN v. JERVIS.

PLEADING.—Argumentative Denial.—It is not error to overrule a demurrer to an answer pleading an argumentative denial.

EVIDENCE.—Assumption of Fact as Ground of Objection.—Where there is a controversy as to the existence of a given fact, counsel have no right to assume the existence of the fact as the basis of an objection to evidence.

SAME.—Leading Questions.—It is only where it plainly appears that the trial court abused its discretion in permitting leading questions to be asked that the Supreme Court will interfere; and there is no abuse of discretion in permitting leading questions upon merely introductory matters.

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SAME.—Practice.—Courts are not bound to sift evidence offered in mass to select the competent from the incompetent, but it is the duty of counsel to offer only competent evidence.

SAME.—Contract.—Where the price of an article is fixed by contract, that price governs, and evidence of the market value of the property is incompetent.

SAME.—Custom.—Where there is an express contract, the rights of the parties must be determined by the contract, and they can not be varied by a custom which contravenes the rules of law.

SALE.—Duty of Seller.—Where goods are sold upon an order from a buyer living at a place distant from the seller, and the latter undertakes to ship them, it is his duty to deliver them to the carrier, properly consigned.

SAME.—Delivery.—Consignment to Seller.—Right of Buyer.—It is the duty of a seller to consign goods to the buyer, unless there is some different agreement, and a seller who consigns goods to himself does not deliver them to the buyer. Where the goods are consigned to the seller, the buyer is not obliged to take them from the carrier, nor is he bound to make inquiry of the carrier for goods not consigned to him.

From the Grant Circuit Court.

G. T. B. Carr, for appellant.

A. Steele and *R. T. St. John*, for appellee.

ELLIOTT, J.—The appellant instituted this action to recover the price of one hundred bushels of potatoes which he alleged were sold and delivered to the appellee under a written contract made by telegraph.

The second paragraph of the answer is good as an argumentative denial, for it denies the delivery of the potatoes to the appellee, and there was, therefore, no material error in overruling the demurrer. The second paragraph was unnecessary but harmless. As no injury resulted to the appellant on this ruling, it can not be deemed a sufficient ground to justify a reversal.

Complaint is made of the ruling of the court on the appellant's motion to strike out parts of depositions taken by the appellee. The part first objected to relates to an examination of the potatoes after their arrival at Delphos, Ohio, where the appellee lived. Counsel assumes that the potatoes examined were not those shipped by the appellant, and upon

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this assumption, argues that the evidence was irrelevant. But this assumption counsel could not justly make, for the question whether the potatoes were the same as those shipped was one of fact, to be determined by the jury from all the evidence in the case. An assumption of fact can not be made for the purpose of suppressing a deposition, unless, indeed, there is an absolute lack of connecting evidence.

It is only where it very clearly appears that the trial court abused its discretion in permitting a party to ask leading questions that appellate courts will interfere. Leading questions upon merely introductory matters are not improper, although they may be upon material matters; but, even then, the appellate courts will only interfere where the trial court has abused its discretion. There was no abuse of discretion here and no injury to the appellant.

It is argued that evidence of the condition of the potatoes some time after they reached Delphos was incompetent, because it did not prove their condition when shipped from Marion, where they were sold. This position is not maintainable. The question for the jury, as to whether the evidence tended to prove that the potatoes were rotten at the time they were shipped, was one of fact for the jury, not of law for the court. The court could not say, as matter of law, that their condition several days after shipment might not supply grounds for inferring their condition at the time of shipment.

There was no error in excluding the proceedings and report of a committee of the Grocers' Protection Union of Delphos. The parties to this action could not be affected by what third persons did in an association organized for the purpose of settling mercantile disputes. But Sohn certainly has no cause of complaint, for the matters stated in the report were strongly against him, and he was benefited, not injured, by its exclusion.

Letters and telegrams written by third persons could not

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affect the merits of this controversy, nor could they help or injure either party, and they were properly excluded.

The banks to whom Sohn sent his drafts for collection were not the agents of Jervis, and the statements of their officers were not admissible against him.

It is probable that the letter of Jervis, offered in evidence, ought to have been admitted, but it was offered in a mass with other papers which were clearly inadmissible, and the court was not bound to hunt through the mass to discover what was competent, but was justified in excluding the evidence as offered. Courts are not bound to sift a mass of offered evidence to select the good from the bad ; that is the duty of the party making the offer. But, if we were wrong in this, still there can be no reversal, for it is perfectly plain that the exclusion of the appellee's letter did the appellant no harm, for its contents were strongly and directly against him.

The price of the potatoes was fixed by contract, and there was no reason for an inquiry into the market price. Where a price is fixed by contract that governs.

The potatoes were ordered by Jervis from Delphos, Ohio, by telegram, and the appellant accepted his proposition. There was, therefore, a complete contract, with all its legal incidents. Where there is a complete written contract with fixed and known legal incidents, the rights of the parties can not be controlled by evidence of a custom contravening the law, or directly violating the terms of the written agreement. It was, therefore, proper to exclude the evidence offered to show a custom that in cases of this character the seller was not to ship or consign to the person to whom he sold them, but to himself.

Where goods are sold upon an order from a buyer living at a distant place, and the seller undertakes to ship them, it is his duty to deliver them to the carrier, properly consigned. This proposition is asserted in the seventh instruction given by the court and in rather more favorable terms than the appellant had a right to ask, and he can not successfully assail it.

The Indianapolis, Peru and Chicago Railway Company v. Bush.

A purchaser of goods living on a line of railroad distant from the seller is not bound to inquire at the railroad depot in any other name than his own, unless he has been notified by the seller that the goods were shipped in some other name. Where goods are ordered by mail and telegraph, to be shipped by the seller, and the seller accepts the proposition contained in the order, it is his duty to consign the goods to the buyer. If he pursues any other course, without at least notifying the buyer, his is the fault and his must be the loss caused by the delay in receiving and caring for the goods at their destination.

Counsel for appellant is correct in asserting that a seller ordinarily delivers the goods when he places them in the hands of the carrier, duly consigned at the place of sale. Here, however, the appellant did not consign the goods to the seller, but consigned them to himself, and there was, consequently, no delivery. The vendee got nothing, could get nothing, for the carrier was not authorized to place the goods in the hands of any other person than the consignee. It is impossible to perceive how there can be a delivery, where both the title and the right of possession remain in the seller.

The verdict is clearly right upon the evidence.

Judgment affirmed.

Filed May 15, 1885.

No. 10,852.

THE INDIANAPOLIS, PERU AND CHICAGO RAILWAY COMPANY v. BUSH.

SPECIAL VERDICT.—*Venire de Novo.*—*Motion for New Trial.*—If a special verdict contain findings of evidence, conclusions of law and matters without the issues, such portions will be disregarded in rendering judgment, and a motion for a *venire de novo*, because of such portions of the verdict, will be overruled. If such verdict fail to find material facts proved, the remedy for such failure is by a motion for a new trial.

SAME.—*Negligence.*—*Province of Jury.*—*Conclusions of Law.*—In an action for

101	588
124	279
124	451
101	582
129	330
101	582
120	497
101	582
122	458
101	588
125	451
136	52
101	582
138	685
101	582
141	544
142	321
143	56
101	582
144	606
146	317
146	561
147	174
101	582
148	186
148	464
149	69

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damages for an injury occasioned by negligence, a special verdict, after reciting facts, stated that the plaintiff was not guilty of contributory negligence, and that the injury was the result of negligence on the part of the defendant.

Held, that such findings as to negligence were conclusions of law which the jury could not make, and that they must be disregarded under a motion for a *venire de novo* assigning them as the ground thereof.

SAME.—*Instructions to Jury.*—Where the rendition of a special verdict is directed, there is no error in refusing to give general instructions as to the law of the case, though the statements in the instructions requested be correct as abstract propositions of law.

NEGLIGENCE.—*Measure of Damages.*—*Moral Character.*—In an action for damages for injury to the person through negligence, the moral character of the plaintiff is not relevant as an element in the measure of damages.

PRACTICE.—*Withdrawal of Erroneous Evidence.*—If before the close of the argument to the jury the court withdraw evidence erroneously admitted, and admonish the jury not to consider it, the error of its admission will be cured.

From the Marion Superior Court.

T. A. Hendricks, C. Baker, O. B. Hord and A. W. Hendricks, for appellant.

L. Ritter, E. F. Ritter and B. W. Ritter, for appellee.

ZOLLARS, C. J.—Appellee was injured by one of appellant's engines at a point where the railroad track crosses Liberty street, in the city of Indianapolis, and brought this action for the recovery of damages resulting from that injury. The action is based upon a charge of negligence.

The grounds of negligence specifically charged are, that, in violation of a city ordinance, appellant failed to have a watchman at the crossing to give him warning of the approaching engine; that in approaching the crossing he looked and listened for a warning from a flagman, and that no warning of any kind was given; that in violation of another ordinance, forbidding the moving of trains through the city at a greater rate of speed than four miles an hour, the engine was brought to and over the crossing, at the speed of eight miles an hour; that those in charge of the train negligently failed to sound

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the whistle or ring the bell, or to give any other warning whatever of the approaching engine.

There is a general charge that the injury occurred by reason of the wrongful, reckless, negligent and unlawful acts of the defendant "aforesaid," and without fault of appellee in driving upon the crossing, or otherwise.

The jury returned a special verdict. At the proper time appellant, by counsel, moved for a *venire de novo* upon twelve different grounds stated. These grounds may be classified and epitomized as follows:

1st. The special verdict, in part, is a statement of evidence, instead of the facts.

2d. The verdict consists, in part, of conclusions of law.

3d. Facts are found which are not averred in the complaint.

4th. There is a failure to find important facts which were proven upon the trial.

It is well settled that it is the office of a special verdict to find the facts, and not the evidence or conclusions of law. *Locke v. Merchants' Nat'l Bank*, 66 Ind. 353; *Dixon v. Duke*, 85 Ind. 434; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186. And so, too, the verdict should be limited to the case as made by the pleadings, and should find all the facts proven under the issues; but it does not follow that if a special verdict should contain evidence, conclusions of law, fail to find facts proven, and find facts without the issue, a motion for a *venire de novo* must be sustained.

If a special verdict includes findings of evidence, conclusions of law, and matters without the issues, such findings will be disregarded in the determination and rendition of judgment.

If, stripped of these matters, the verdict is yet sufficient to lead to and support a judgment either way under the issues as made by the pleadings, a motion for a *venire de novo* will be overruled. Such a motion will not be sustained except where there is some defect, uncertainty or ambiguity upon

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the face of the verdict, rendering it so defective that judgment can not be rendered upon it. *Heckelman v. Rupp*, 85 Ind. 286; *Henderson v. Dickey*, 76 Ind. 264; *Brickley v. Weghorn*, 71 Ind. 497; *Knox v. Trafalct*, 94 Ind. 346.

If the verdict fails to find any fact established by the evidence, finds facts without the issue, or not established by the evidence, the remedy is by motion for a new trial, assigning proper causes.

Upon the question of appellant's negligence, and the negligence of appellee, the special verdict is as follows:

The track of the Union Railway Company crossed Liberty street parallel with and near the track of appellant. For about two years prior to the accident and at that time those two companies, by an arrangement between them, had kept a flagman at the crossing, whose duty it was to keep himself in a proper position to warn approaching travellers upon the street of the approach of trains, and also to discharge the duties of switchman. The obstruction to a view of the track by approaching travellers was such as to make the crossing one of unusual danger. As the engine neared the street, the fireman, whose duty it was to ring the bell and keep a lookout for approaching travellers, left the engine on the side opposite from which appellee was approaching, and did not ring the bell. The engineer, whose duty it was also to keep a lookout as he approached the crossing, neglected that duty and was looking to the rear of the train. Before and at the time appellee approached the crossing, the flagman was away from his post of flagman, adjusting switches, and gave no warning at all to appellee of the approach of the train. No notice or warning of any kind was given to appellee of the approaching train, that he heard or saw, by appellant or any other person. Appellee was in an open buggy driving a horse in an ordinary trot as he approached the crossing. As he neared it, he looked and listened continuously from a point one hundred and seventy-five feet

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from the railroad track for a warning from a watchman, the ringing of a bell, and other signals of an approaching train. Until the horse was within five feet of the track, the view of the train was entirely obstructed by buildings. He neither saw nor heard any signals of the approaching train until his horse was within five feet of the track, at which time the engine was within five feet of the horse. He then tried to stop the horse, but he, becoming frightened, sprang forward, and appellee, in attempting to jump from the buggy, fell and was run over by the engine.

His leg was so crushed that it had to be amputated between the hip and knee. At the time of the injury appellee was twenty-seven years old, and in vigorous health. At the close of the verdict are conclusions by the jury that appellee was not guilty of contributory negligence, and that the injury was the result of carelessness and negligence on the part of appellant. These conclusions are conclusions of law that the jury could not make, and hence must be disregarded in deciding as to the sufficiency of the verdict. *Pittsburgh, etc., R. R. Co. v. Spencer, supra.*

Whether or not sufficient facts are found in the verdict to support the judgment is another question, and a question which is not raised by the motion for a *venire de novo*. That motion was properly overruled.

Appellant asked a number of instructions which the court refused. The refusal was assigned as a cause for a new trial below, and is urged here as error.

In the first the court was asked to instruct the jury that the only acts of negligence averred were excessive speed of the train, want of a flagman at the crossing, the failure to ring the bell and sound the whistle, and that no other question as to negligence could arise in the case.

The substance of the third was, that no ordinance requiring a flagman at the crossing had been introduced in evidence, and that hence the company was under no legal obligation to keep one there.

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The fourth was, in substance, that if the Union Railroad Company had kept a flagman at the crossing, and he had been employed by appellant merely to attend to its switches, he was not a flagman of appellant, and hence it was not responsible for his omissions.

The fifth was, that if the crossing was a dangerous one, more care was required on the part of appellee in approaching and going upon the crossing.

The sixth was, that the appellant was only bound to exercise ordinary care at the crossing to prevent injury to appellee.

The seventh was, that the mere fact that appellee was injured was not of itself sufficient to authorize the jury to impute negligence to appellant.

The eighth was, that if the engine, before the appellee passed to and upon the crossing, was standing a distance from the crossing, and the headlight thereof so shone upon the crossing that appellee could have seen it in time to have avoided the injury, he was guilty of negligence.

The ninth was, that if there was no evidence of the existence of an ordinance requiring a flagman, as averred in the complaint, the jury would not be justified in finding against appellant because of the absence of a flagman at the crossing.

It will be readily perceived that each and all of these instructions except the first were statements of the rules of law relating to the legal effect of certain evidence, the negligence of the parties, and the ultimate liability of appellant.

When the jury are to find a general verdict according to the evidence and the law, as they receive it from the court, the court must instruct as to the law, and instruct correctly. But in this case the jury were to find, not the law, but the facts simply, entirely independent of their legal bearings, and regardless of any consideration of liability on the part of any one. It was not a case, therefore, for general instructions as to the law of the case, and there was no error, therefore, in refusing such instructions.

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As to whether or not the instructions were correct, as abstract propositions of law, we decide nothing. It would not have been an available error had the first instruction been given; neither can error be predicated upon its refusal.

Whether the instructions stated the averments of the complaint correctly or incorrectly, it is very apparent upon examination of the verdict that the refusal has been harmless to appellant.

No fault is found by appellant with the instruction of the trial court upon the question of the measure of damages, so far as it goes. There is a contention, however, that the court erred in refusing one of appellant's instructions, which added, as a further element for the consideration of the jury in fixing the damages, the character of appellee.

Moral character has nothing to do here with the measure of damages. A man of the worst character may be entitled to as much damages for an injury as a man of the highest character. There was, therefore, no error in refusing the instruction.

For the purpose of affecting the amount of damages, as counsel for appellant state, they sought to prove certain facts which, as they argue, would have tended to show that appellee had for a short time, in some way, been connected with a house of ill-fame. We do not perceive how such evidence could affect the amount of damages in this case, nor are we informed by counsel. Some of the offered evidence related to the house of appellee's aunt and to a date subsequent to the time when he lived in the house with her. The witnesses, by whom it was proposed to prove the character of the house, disclaimed all knowledge of appellee as connected with the house, or otherwise. Hence, if in any event such evidence might have been competent, it would have been necessary to establish the character of the house at the time appellee lived there, or in some way connect him with it. This appellant's counsel did not propose to do, nor did they assert their ability so to do, although informed by the court

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that the evidence would be admitted if they would thus connect appellee with the house.

A man's character can not be ascertained, nor his reputation overthrown, by showing that a house in which he has once lived has become a house of prostitution. It should be observed, too, that no question is made that the damages are excessive. They are clearly not. And hence if there had been error in excluding the offered evidence, it was a harmless error.

Appellee was allowed to prove by one Beymer, who was in the buggy with him, that as they neared Liberty street and the crossing, he took the lines from Beymer saying, that "he was afraid of the crossing." Before the argument was closed, the court withdrew this evidence from the jury, and admonished them that they were not to consider it. This cured the error of its admission. *Zehner v. Kepler*, 16 Ind. 290. After the witness Beymer had testified that he was in the buggy with appellee, and that no signals of the approaching train were given, appellant's counsel passed him through a lengthy and searching cross-examination for the purpose of showing that he was intoxicated at the time of the collision. In the course of the cross-examination, questions were propounded as to whether appellee had been drinking on the afternoon and before the injury. Objections were sustained to these questions. There was no error in this. These questions, as to appellee, were in no way a proper cross-examination upon anything drawn out in the examination in chief. It is urged in argument, also, that the trial court erred in sustaining objections to questions by appellant's counsel to the witness Shields, on cross-examination. Here, as in the case with the witness Beymer, the questions were not within the limit of a proper cross-examination, and were, therefore, properly ruled out. We have thus followed counsel in their argument of the several points, and have found no error for which the judgment should be reversed.

By proper motions, objections and exceptions, questions

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were made below that the verdict is not sustained by sufficient evidence, and that the judgment upon the verdict should have been for appellant, and not for appellee. These questions are not discussed here, and hence must be taken as waived. We, therefore, express no opinion upon them.

The judgment is affirmed, with costs.

Filed April 29, 1885.

No. 11,934.

GATHRIGHT ET AL. v. BURKE.

NOTICE.—*Name.*—*Signs.*—A father, who had been in business for a number of years, sold out to his son, who continued the business; no change was made in the names or signs about the place of business, and the son bought goods of the appellants, who had formerly dealt with his father, but the sellers had notice that the father had retired, and that the son had succeeded him.

Held, that the father was not liable for the goods sold to the son.

From the Floyd Circuit Court.

J. H. Stotsenbury and *P. H. Jewett*, for appellants.

J. G. Howard, *J. F. Read*, *M. Z. Stannard* and *F. B. Burke*, for appellee.

ELLIOTT, J.—The appellants brought this action to recover the value of a lot of flour alleged to have been sold and delivered by them to the appellee.

The questions in the case arise on the evidence, and the controlling one is: To whom was the flour sold and delivered, the appellee James Burke, or his son William Burke? The court held that the purchaser was the son and not the father.

It is settled that where the evidence is conflicting, this court will not undertake to weigh it, but will accept that which the trial court accepted as credible and satisfactory. *Arnold v. Wilt*, 86 Ind. 367; *Cain v. Goda*, 94 Ind. 555; *Julian v. Western Union Tel. Co.*, 98 Ind. 327. This rule

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requires us to accept as satisfactory the testimony of the witnesses upon which the court below acted.

It appears from the evidence that James Burke, the father, had for a long time been engaged in business and had purchased goods of the appellants, but, before the purchase of the flour sued for, he sold out to his son and embarked in other business. After the son bought from his father, he continued business at the same place and made no change in the signs about the place. The appellant's contention is that this evidence makes a case in their favor under the rule declared in *Elverson v. Leeds*, 97 Ind. 336 (49 Am. R. 458). That case was a very peculiar one and can not have a very general application, and, certainly, can not apply here, where there is evidence fully tending to show that the party who had sold out the stock, and retired from business, did not know that purchases were being made by his vendee under the name in which the business was formerly conducted, and where the sellers knew of the change. We say that there was evidence that the appellants knew of the change in the ownership of the store, because William Burke testified that he notified the agent who took the orders not to charge the orders to James Burke. In addition to this testimony there were other circumstances justly supporting the inference that the agents of the appellants, through whom the business with William Burke was transacted, must have known that James Burke was not the buyer.

Judgment affirmed.

Filed May 19, 1885.

No. 11,958.

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140	575

DRAINAGE.—*Petition and Verification.*—*Motion to Dismiss.*—*Error.*—Where the petition for drainage and the verification thereof substantially follow the forms given in section 4284, R. S. 1881, there is no error in over-

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ruling a motion to dismiss the petition and proceedings for want of formality in the verification.

PRACTICE.—Motions and Affidavits.—Bill of Exceptions.—Record.—Appeal.—

On appeal to the Supreme Court, motions and affidavits constitute no part of the record, unless they are made so either by a bill of exceptions or by an order of the trial court; and where it is attempted to make motions or affidavits a part of the record by bill of exceptions, they must be set out at length in such bill or be referred to therein as properly appearing elsewhere in the record.

From the Fulton Circuit Court.

D. Turpie, I. Conner and — *Rickel*, for appellant.

J. Rowley, for appellees.

Howk, J.—On the 29th day of January, 1884, the appellees, McMahan and McIntire, filed in the clerk's office of the court below their petition in writing for the location and construction of a certain ditch in Fulton county. Afterwards, on the 25th day of February, 1884, the appellees appeared in open court and made proof of the posting of notices of the filing of such petition; and the proceedings appearing to be regular and in proper form, such petition was then docketed as a cause pending in such court. Thereafter, on the 29th day of February, 1884, it appearing that no demurrer to or remonstrance against such petition had been filed, and no objections made thereto, the petition was then referred to the drainage commissioners of Fulton county, who were ordered to meet at a time and place designated to view and make a survey of the proposed ditch, and make report to the court on the first day of its next term. Afterwards, on the 28th day of April, 1884, being the first judicial day of the April term of the court, the drainage commissioners made their written report to the court, wherein they stated, among other things, that the proposed drainage would improve the public health of the neighborhood, would benefit seven highways, would be of public utility in the county, and could be accomplished at an expense less than the aggregate benefits to the lands to be affected thereby. And it appearing from the report of the

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drainage commissioners that lands were included therein which were not described in appellees' original petition, the court ordered that the appellees give notice to such parties as the law in such cases directs, and the hearing of such report was fixed for May 9th, 1884.

On that day the appellees made proof of notice of the additional assessments; and then, for the first time, the appellant Shields, a party assessed with benefits, appeared and filed his written remonstrance against the proposed ditch. On May 13th, 1884, and before any action was had on his remonstrance, the appellant filed a written motion to dismiss the petition and proceedings in this cause. This motion the court overruled, and the appellant excepted, and such ruling is the first error assigned by him in this court.

It is claimed in argument that the motion to dismiss ought to have been sustained, because it is said that the petition was not verified in such manner as to give the court below jurisdiction of the subject-matter of the petition. In section 4274, R. S. 1881, it is provided that "such petition shall be verified by the affidavit of some petitioner or owner of real estate in the vicinity of the lands." In section 4284, R. S. 1881, certain forms are given which "may be used, and shall be sufficient in all cases where they are applicable." In this case the petition and its verification substantially follow the form of a petition and the verification thereof, given in such section 4284, and, therefore, they are sufficient. Besides, the appellant's motion is not in the record, although a bill of exceptions was signed and filed apparently for the purpose of making such motion a part of the record. But the motion to dismiss is not copied into the bill of exceptions, nor is it referred to therein as appearing elsewhere in the transcript, and, therefore, such motion is not in the record. *Kesler v. Myers*, 41 Ind. 543; *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Kimball v. Loomis*, 62 Ind. 201.

We are of opinion, therefore, that the first error of which
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appellant complains in the case at bar is not properly saved in the record before us, but that, if it were so saved, the petition and its verification substantially comply with the statutory forms, and are sufficient. The motion to dismiss was correctly overruled.

Afterwards, on May 15th, 1884, the appellee McMahan filed his affidavit in support of his motion, previously made, for leave to sign his name in the proper place to his affidavit, verifying the petition. Thereupon the court sustained such motion, and gave the appellee McMahan leave to sign his name to such affidavit, which was done accordingly, to all of which the appellant at the time excepted. This action and ruling of the court the appellant has assigned here as his second error.

This error, also, is not so saved in nor presented by the record of this cause as that it can be considered by this court; for, although a bill of exceptions was signed and filed apparently for the purpose of making the action of the court complained of as error a part of the record, yet the affidavit, upon which the motion was sustained and the leave of court granted, is not copied into such bill, nor referred to therein as appearing elsewhere in the record. Under the established practice of this court, the affidavit is not in the record, and, in its absence, the second error complained of presents no question for our decision. *Kimball v. Loomis, supra*; *Fryberger v. Perkins*, 66 Ind. 19; *Williams v. Potter*, 72 Ind. 354; *Harison School Tp. v. McGregor*, 96 Ind. 185.

On the 15th day of May, 1884, the record of the cause, after showing the presence of the appellant in court, excepting to its rulings and filing bills of exceptions, then proceeds as follows: "And now said matter is submitted to the court and proof heard, and the court declares said proposed ditch established according to the report of the commissioners, and said assessments in said report are approved and confirmed, * * * and the construction of said ditch is referred

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to Isaac Busenberg, one of the drainage commissioners of Fulton county." This seems to have been the final order and judgment of the court in this cause, and the appellant neither objected nor excepted thereto, nor did he move the court for a new trial.

On the 2d day of September, 1884, the appellant appeared and filed his motion to set aside the confirmation of the report of the drainage commissioners, theretofore entered. This motion was overruled, and the appellant excepted, and filed a bill of exceptions. This ruling of the court is assigned by appellant as his third and last error.

This motion seems to have been *ex parte*; at least the record fails to show any appearance by the appellees, or any notice to them of the motion. It does not appear to have been supported by any affidavit. The motion is not copied into the bill of exceptions, nor is it referred to therein as elsewhere appearing in the record. Therefore, the motion is not a part of the record. *Kimball v. Loomis, supra*. It may be that the court erred in overruling this motion, but, if it did, the record fails to show such error. In such a case, it is settled by many decisions that this court will presume, in favor of the decision below, that no error was committed. *Myers v. Murphy*, 60 Ind. 282; *Foster v. Ward*, 75 Ind. 594; *Peck v. Board, etc.*, 87 Ind. 221.

There is no error, shown by the record before us, which authorizes the reversal of the judgment below.

The judgment is affirmed, with costs.

Filed May 2, 1885.

 No. 12,312.

LANCE v. PEARCE ET AL.

EVIDENCE.—*Delivery of Goods May be Inferred from Circumstances.*—In an action to recover the value of goods sold and delivered, the delivery need not necessarily be proved by direct evidence, for it may, like any other fact, be inferred from circumstances.

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 139 186

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STATUTE OF FRAUDS.—Charging Goods to Third Person.—Collateral Promise.

—The mere fact that the seller of goods, at the request of the buyer, charges them to a third person, does not make the buyer's promise to pay a collateral one within the statute of frauds, but such promise is an original undertaking, and is not voidable under the statute.

From the Gibson Circuit Court.

C. A. Buskirk, for appellant

H. A. Yeager, for appellees.

ELLIOTT, J.—The appellant asks a reversal upon the ground that the evidence fails to prove some of the essential elements of the appellees' case.

It is true that in order to recover upon a complaint for the value of goods sold and delivered, the plaintiff must prove a delivery, but it is not true that this must be done by direct evidence, for it may, like any other fact, be inferred from circumstances. As there was indirect evidence fully warranting the conclusions of the trial court upon this point, we can not disturb it.

The evidence shows that the goods were sold to the defendant, although they were charged to Albert Kendle at his request. The fact that the goods were charged to Kendle was a mere circumstance tending to support the appellant's theory, but it is not of such force as to control the positive testimony upon which the court acted.

The mere fact that the appellees in compliance with appellant's request charged the goods to Kendle does not make the promise of the appellant a collateral one within the statute of frauds. If the goods were sold to the appellant, and if he promised to pay for them, the undertaking was an original one, and is not voidable under the statute. A buyer can not evade paying for goods sold to him solely upon the ground that they were charged to another person. The fact of the charge to a third person affords some evidence that the original contract was with him, but the evidence is by no means of a conclusive character, and in this instance the evi-

The Evansville and Terre Haute Railroad Company v. Mosier.

dence strongly and satisfactorily shows that the goods were sold directly to the appellant.

Judgment affirmed.

Filed May 16, 1885.

No. 11,797.

THE EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY v. MOSIER.

RAILROADS.—Killing Cattle.—Evidence.—It is not necessary for the plaintiff in an action against a railroad company for killing cattle, to prove by positive evidence the place where the cattle entered, but it is sufficient if facts are proved from which the place of entry can be inferred.

SAME.—Burden of Proof.—The burden of proof, in an action against a railroad company for killing cattle, is on the plaintiff to show that the place where the cattle entered was not securely fenced; but where the railroad company asserts that the place was one which it was not bound to fence, then the burden is on it to establish that fact.

SAME.—Private Crossings.—Fences.—The general rule is that a railroad company is bound to fence private crossings, but this duty is not owing to the person for whose benefit the crossing is maintained.

From the Knox Circuit Court.

A. Iglehart, J. E. Iglehart and E. Taylor, for appellant.

ELLIOTT, J.—This case is here on the evidence. The appellee was the owner of two colts which were kept in a pasture adjoining the appellant's railroad track. They escaped from the pasture, went upon the track and were killed by one of the appellant's locomotives. The pasture was owned and used by the appellee in common with four other persons. There were two private crossings opening from it upon the track, and these were fastened by gates. The gates were about one-half of a mile apart; the south gate was used by the appellee, but the north gate was not. The colts entered the track from the north gate and were killed not far from the crossing. The gates were good ones and were usually kept shut, and when shut the track was securely fenced.

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The contention that the plaintiff in such an action as this must prove by direct evidence the place where the animals entered upon the track, can not be maintained. It is true that the place of entry is the important question, but it is not true that it must be shown by positive evidence; it is sufficient if circumstances are proved from which the fact can be legitimately inferred. *Indianapolis, etc., R. R. Co. v. Collingwood*, 71 Ind. 476; *Indianapolis, etc., R. W. Co. v. Thomas*, 84 Ind. 194; *Louisville, etc., R. W. Co. v. Kiouss*, 82 Ind. 357; *Whitewater R. R. Co. v. Bridgett*, 94 Ind. 216.

The plaintiff in such an action as this has the burden of showing that the place where his animals entered was not securely fenced, but, where the railroad company asserts that the place was one which it was not bound to fence, it must affirmatively establish that fact. *Ft. Wayne, etc., R. R. Co. v. Herbold*, 99 Ind. 91, and authorities cited; *Baltimore, etc., R. Co. v. Kreiger*, 90 Ind. 380. It was for the appellant, therefore, to show that the place where the animals of the appellee entered was one which it was not bound to fence.

The general rule is that railroad companies are bound to maintain fences at private crossings. *Indiana Central R. W. Co. v. Leamon*, 18 Ind. 173; *Indianapolis, etc., R. R. Co. v. Lowe*, 29 Ind. 545; *Cincinnati, etc., R. R. Co. v. Ridge*, 54 Ind. 39; *Indianapolis, etc., R. R. Co. v. Thomas*, 84 Ind. 194; *Baltimore, etc., R. R. Co. v. Kreiger, supra*; *Railroad Co. v. Cunningham*, 39 Ohio St. 327.

To this general rule there are exceptions. The duty to fence is not owing to one who has undertaken to maintain the fence, nor to one for whose benefit the private crossing is maintained. *Terre Haute, etc., R. R. Co. v. Smith*, 16 Ind. 102; *Indianapolis, etc., R. R. Co. v. Shimer*, 17 Ind. 295; *Bond v. Evansville, etc., R. R. Co.*, 100 Ind. 301. The decision in the case last cited controls here, for, although the appellant used the south crossing, still the north one was maintained for the benefit of those with whom he was united in interest, and it

Alexander v. The Board of Commissioners of Monroe County.

is impossible to sever their interests. All were interested in the crossing, and no one of them can maintain an action for a loss resulting from the failure to keep the gate constantly closed. The duty of the railroad company to those for whose benefit it permits the crossing to be maintained is very different from that which it owes to other persons and the public. So far as concerns those for whose benefit the private way is maintained, its duty does not extend so far as to require it to exercise constant vigilance to keep the gate closed.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

Filed May 21, 1885.

No. 11,574.

ALEXANDER v. THE BOARD OF COMMISSIONERS OF MONROE COUNTY.

From the Monroe Circuit Court.

J. W. Buskirk and H. C. Duncan, for appellant.

J. H. Loudon, R. W. Miers, A. G. Cavins, E. H. C. Cavins, W. L. Cavins and H. H. Friedley, for appellee.

FRANKLIN, C.—Without stating anything about the issues and rulings of the court in this case, it is sufficient to say that the precise question presented in this case was decided adversely to appellant in the case of *Bynum v. Board, etc.*, 100 Ind. 90. Upon the authority of that case, the judgment in this case must be affirmed.

PER CURIAM.—It is therefore ordered that the judgment be and it is affirmed with costs.

Filed Jan. 29, 1885; petition for a rehearing overruled April 2, 1885.

SEXSON v. The Board of Commissioners of Greene County.

No. 11,819.

SEXSON v. THE BOARD OF COMMISSIONERS OF GREENE
COUNTY.

From the Greene Circuit Court.

S. O. Pickens, S. W. Axtell and W. M. Moffett, for appellant.*A. G. Carins, E. H. C. Carins and W. L. Carins*, for appellee.

ZOLLARS, C. J.—In this action appellant seeks to recover for “keeping, guarding and taking care of the jail of Greene county, and the prisoners therein confined,” exclusive of the amount allowed for boarding the prisoners. The claim is wholly for services as above stated, and involves no item of expenditure for the county in the maintenance and furnishing of the jail. The case is in every particular, so far as any legal questions are presented, the same as the case of *Bynum v. Board, etc.*, 100 Ind. 90. It was held in that case that sheriffs are not entitled to recover for such services. Upon the authority of that case the judgment of the court below in this is affirmed, with costs.

Filed Jan. 30, 1885; petition for a rehearing overruled April 1, 1885.

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APPEAL BOND.

See GRAVEL ROAD, 5.

1. *Liability of Obligors.—Rent of Land Pending Appeal.*—The obligors upon an appeal bond, given by the defendant on appeal to the Supreme Court from a judgment for the possession of real estate, are liable for the amount of the money judgment, and for the rental value of the real estate pending the appeal. *Hays v. Wilstach, 100*
2. *Same.—Stay of Proceedings.—Consideration.*—The legal effect of an appeal bond, given by a defendant on appeal to the Supreme Court from a judgment against him for possession of real estate, is to stay proceedings upon such judgment, which is a sufficient consideration to bind the obligors. *Ib.*
3. *Surety.—Subrogation.—Equity.*—A surety on an appeal bond has a right to be subrogated to the lien of the judgment appealed from and paid by him, and his equities are superior to those of a purchaser in good faith who buys the land on which the judgment is a lien after the execution of the appeal bond. *Peirce v. Higgins, 178*
4. *Same.—Effect of.*—The undertaking of the surety in an appeal bond to pay the judgment does not cut off his right to subrogation, and persons who buy after the execution of the bond are chargeable with notice of his right to subrogation. *Ib.*

ARGUMENT OF COUNSEL.

See CRIMINAL LAW, 5; PRACTICE, 21, 22, 32, 33.

ASSIGNMENT.

See PRACTICE, 6; PRINCIPAL AND SURETY, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Trust Estate.—Suit by Assignee.—Exhibit.—In a suit by an assignee in a voluntary assignment for the benefit of creditors, for the recovery of a part of the trust estate, he must allege that the deed of assignment to him has been duly recorded in the recorder's office of the proper county, and must file a copy of such deed as an exhibit; otherwise his complaint must be held bad on demurrer for the want of sufficient facts. *Wheeler v. Hawkins, 486*

ASSIGNMENT OF ERROR.

1. *Answer.*—An assignment of error in the Supreme Court, that the court below erred in sustaining a demurrer to a paragraph of answer, does not call in question the sufficiency of the complaint. *Stockwell v. State, ex rel., 1*
2. *Practice.*—A joint assignment of error presents no question upon any ruling against one party individually. *Quick v. Brenner, 230*

3. *Clerical Error.—Supreme Court.*—A mere clerical mistake in an assignment of error, such as the use of one word for another, will not preclude the Supreme Court from considering and deciding the precise question manifestly intended to be presented. *Landon v. White, 249*

ATTACHMENT.

See FRAUD, 6 to 8.

1. *Garnishee.—Liability of.*—A garnishee, from the time of the service of the summons upon him, is accountable to the plaintiff in the action for the amount of money, property or credits in his hands, or due and owing from him to the defendant.

First Nat'l Bank v. Armstrong, 244

2. *Same.—Conversion of Securities after Summons.*—Where a bank, summoned as garnishee, after the service of summons, converts and disposes of collateral securities held by it, the burden is upon it to account to the plaintiff and to show that it has properly discharged its duty as custodian of such securities. *Id.*

3. *Bond.—Parties.—Complaint.*—The complaint of B. and S., on an attachment bond, averred a suit by the principal defendant against B. and S., and affidavit that B. was a non-resident, and an undertaking in attachment in the usual form, payable to the defendants for all damages he may sustain, etc., the issuing of a writ of attachment against B. and S., under which the sheriff seized and held a stock of goods which they owned as partners, until it was released by a delivery bond; that upon the attachment there was a judgment for B. and S.; that that proceeding was wrongful, to their damage.

Held, on demurrer to the complaint, that it was bad, because S. had no right of action jointly with B. or otherwise. *Faulkner v. Brigel, 329*

ATTORMENT.

See LANDLORD AND TENANT, 6.

BANKRUPTCY.

See JUDGMENT, 1; MORTGAGE, 16; SHERIFF'S SALE, 5, 6.

BASTARDY.

See NEW TRIAL.

1. *Paternity of Child.—Harmless Error.—Instruction.*—Where, in a trial for bastardy, all the facts essential to a recovery are established by uncontradicted evidence, and practically conceded, except that of the paternity of the child, an instruction which directs the attention of the jury to that question specifically, is harmless to the defendant.

Harper v. State, ex rel., 109

2. *Evidence.*—It is proper to permit the relatrix, in a prosecution under the statute regulating proceedings in bastardy cases, to prove that the defendant was frequently in her company. *Marks v. State, ex rel., 353*

BILL OF EXCEPTIONS.

See CRIMINAL LAW, 9, 16; PRACTICE, 1, 15, 26, 34.

1. *Short-Hand Reporter.*—Where a bill of exceptions purports to contain the evidence, and it appears in the form of a short-hand report written out, with the clerk's certificate that the manuscript was filed in his office, "furnished by I. K., short-hand reporter of said court," there is a substantial compliance with the statute upon the subject. *Lord v. Bishop, 334*

2. *Testimony.—Practice.*—In order to make testimony a part of the record, on appeal, the bill of exceptions must state, not merely that such testimony was offered, but that it was given.

Peck v. Louisville, etc., R. W. Co., 366

BOARD OF HEALTH.

1. *County Commissioners.—Secretary.*—Under the statute, R. S. 1881, section 4993, the county commissioners constitute the board of health of the county, and a physician who is selected by the county board of health as its secretary is entitled to such compensation from the county treasury as such board may determine. *Waller v. Wood, 138*
2. *Same.—Compensation, How Paid.*—When the secretary's compensation is determined by the board of health, it is the duty of the county commissioners as such to cause it to be paid out of the county treasury by the auditor's warrant for the amount on the treasurer. *Id.*
3. *Same.—Presumption.—Supreme Court.*—Where the county commissioners made an allowance to the secretary of a board of health, the Supreme Court will presume, in favor of the ruling of the circuit court dismissing an appeal therefrom, that the board of health had determined the amount of his compensation, and that the allowance was made by the county commissioners in payment of the same. *Id.*
4. *Same.—Query, Whether the allowance by the county commissioners to the secretary of the county board of health is not of itself a determination of the amount of such compensation within the meaning of the statute.* *Id.*
5. *Same.—Appeal.—Discretion of Board of Health.*—No appeal lies from an order of a county board of health fixing the compensation of its secretary, the statute creating boards of health investing them with discretionary power in that regard, and making no provision for appeal. *Id.*

BOND.

See APPEAL BOND; ATTACHMENT, 3; DECEDENTS' ESTATES, 1; GRAVEL ROAD, 1; GUARDIAN AND WARD, 3.

BRIDGES.

See NEGLIGENCE, 1, 2.

BROKER.

See PRINCIPAL AND AGENT.

BURDEN OF PROOF.

See ATTACHMENT, 2; DEMURRER TO EVIDENCE, 6; GRAVEL ROAD, 4; NEGLIGENCE, 2; PLEADING, 24; PRACTICE, 2, 32; RAILROAD, 9; SPECIAL FINDING, 2.

CHANGE OF VENUE.

See PRACTICE, 22.

CHATTELS.

See CHATTEL MORTGAGE; FRAUD, 6 to 8; JUDGMENT, 6.

CHATTEL MORTGAGE.

Foreclosure.—Deficiency.—Waiver.—Payment.—Semble, that a mortgagee of chattels, to secure a personal claim against the mortgagor for any balance of the mortgage debt after the sale of the mortgaged chattels, must foreclose his mortgage and sell such chattels under the decree of court; that, by selling in any other way, he will waive all claim for any such deficiency, and that his taking and retaining possession of such chattels, without foreclosure of his mortgage and sale under the decree, will constitute payment of the mortgage debt.

Landon v. White, 249

CITY.

See DRAINAGE, 19; TAXES.

COLLATERAL ATTACK.

See ADOPTION, 2.

COMMON CARRIER

See DELIVERY.

CONDITION.

See CONTRACT, 7; DEED, 1, 2; MORTGAGE, 15.

CONSIDERATION.

See APPEAL BOND, 2; EVIDENCE, 10, 11; PLEADING, 20.

CONSPIRACY.

See EVIDENCE, 7; FRAUD, 1 to 3.

CONSTABLE.

Execution.—Protection of Officer by Writ.—A constable is protected by a writ regular on its face and issued by a court of competent jurisdiction.

Hartlep v. Cole, 458

CONSTITUTIONAL LAW.

See COUNTY COMMISSIONERS, 1; PROSECUTING ATTORNEY.

1. *Statutes.—Natural Right.*—Whether a statute encroaches upon natural rights of the citizen is a legislative and not a judicial question, and courts can not overthrow a statute upon the ground that it encroaches on natural rights. *Hedderich v. State, 564*
2. *Same.—Legislative Power.*—The only limitations upon the power of the Legislature are those imposed by the State Constitution, the Federal Constitution, and the treaties and acts of Congress adopted and enacted under it. *Ib.*
3. *Same.—Title of Acts of Legislature.*—The title, "An act concerning public offences and their punishment," is sufficiently comprehensive to include all crimes and misdemeanors. *Ib.*
4. *Same.—Intoxicating Liquors.—License.*—The statute prohibiting the sale of intoxicating liquor between the hours of eleven o'clock P. M., and five o'clock A. M., is constitutional, and applies to licensed retailers of intoxicating liquor. *Ib.*

CONTINUANCE.

1. *Practice.—Deposition.—Diligence.*—Where a witness resides in another State, it is the duty of a party to take his deposition, and if he fails to do this he can not secure a continuance upon the ground that the witness promised to be in attendance at the trial, but violated his promise. *Marks v. State, ex rel., 353*
2. *Same.—Harmless Error.*—Where a party applies for a continuance upon the ground that a witness is absent, but it appears that on the trial the witness was present and testified, the error in refusing the continuance is a harmless one. *Ib.*

CONTRACT.

See COUNTY COMMISSIONERS, 6; DECEDENTS' ESTATES, 4; DELIVERY; EVIDENCE, 17, 23; FALSE IMPRISONMENT, 1, 2; FRAUD, 1, 4, 5; INSURANCE; PLEADING, 15, 16; STATUTE OF FRAUDS.

1. *Tender.—Excuse for not Producing Money.*—A buyer, who contracts to make a tender at a specified time, performs his part of the contract if he goes to the house of the seller, who has no other place of business, on the day named, prepared to make a tender, and not finding him makes ineffectual search for him, but does not find him for several days afterwards, and then offers the money and is notified that it will not be accepted; and such refusal operates as an excuse for not actually producing the money. *Mathis v. Thomas, 119*

2. *Same.—Effect of Refusal.*—A purchaser who has once made a valid tender of money, and is notified that the seller repudiates the contract, is not bound to make a second or subsequent tender. *Id.*
3. *Same.—Sufficient if Money Present although in Possession of Third Person.*—A tender is good if the money is present and the purchaser can secure it at once and immediately deliver it to the seller, although it may at the time be in the possession of a third person. *Id.*
4. *Pleading.*—A. bought a wind-mill of B., for which he agreed to pay one hundred dollars in cash "when," as the contract provided, "the mill is up and in good working order," and in the contract was written this stipulation: "If you accept this order and ship me the goods ordered above, it is with the distinct understanding, and is a part of this contract, that if the mill does not work well for sixty days after erected, I am to notify you, and give you sixty days after the receipt of such notice by you in which to remedy the defect, and if you can not make it work well you are to remove the wind-mill and release me from the amount which I have paid for said mill as above stipulated."
- Held*, that this provision did not make it necessary for the seller to aver in his complaint that the mill did work well for sixty days, but that the effect of the stipulation is not to postpone the cash payment, but to enable the buyer to get back the money paid by him if the mill did not so work. *McClumrock v. Flint, 278*
5. *Same.—Warranty.*—It is not sufficient to aver in general terms that a wind-mill, sold under the provisions of the contract above set forth, did "not work well," but the particulars wherein it was defective, or wherein it failed to work, must be stated. *Id.*
6. *Same.—Sale.—Implied Warranty.*—Where a manufacturer sells an article manufactured by him with knowledge of the place where it is to be used, and the purpose to which it is to be applied, he impliedly warrants that it is reasonably fit and suitable for such place and purpose. *Id.*
7. *Railroads.—Condition Precedent.*—To assist the plaintiff, a railroad company, in building its road as proposed, H. agreed in writing to pay it \$200 upon the arrival at Delphi from Indianapolis of the first train of cars over the track of railroad proposed to be built by the plaintiff from Indianapolis to Chicago. The road was built from Delphi to within one and a half miles of Indianapolis, but by a different route, and thence to a depot in the latter place the track of another road was used, and by this line a train of cars came from Indianapolis to Delphi.
- Held*, that the condition precedent was not performed, and there could be no recovery. *Indianapolis, etc., R. R. Co. v. Holmes, 348*
8. *Principal and Agent.—Commissions.*—The appellant and the appellee entered into a written contract on the 7th day of July, 1880, wherein the former agreed to pay the latter three per cent. commission for selling real estate; subsequently a verbal contract was made, wherein it was agreed that the appellee should enter the service of the appellant at a compensation of one dollar and twenty-five cents per day, but there was evidence showing that the written contract was not modified or abrogated; and that the compensation stipulated in the verbal contract was for managing appellant's general business.
- Held*, that the verbal contract did not necessarily supersede the original written agreement, and prevent the agent from recovering commissions for services performed under it. *Smith v. Lane, 449*
9. *Delivery.—Pleading.—Complaint.—Variance.*—The complaint alleged that the plaintiffs agreed to deliver, and the defendant to receive, at a stipulated price, one hundred stock hogs within twenty days from

the date of the agreement, at either of two designated scales, where said hogs were to be delivered to the plaintiffs; that the plaintiffs had the hogs ready for delivery at the time and place agreed upon, and notified the defendant to that effect, who refused to receive them. The evidence tended to show that plaintiffs purchased the hogs from different persons and had them ready to be delivered, and that they then notified the defendant of their readiness to deliver, and requested him to be at the scales to receive them, but plaintiffs had not actually driven the hogs to the scales.

Held, that there was a substantial compliance with the contract on the part of the plaintiffs, and that the evidence sustains the complaint in its general scope and meaning. *Carter v. Carter*, 450

10. *Promise to Make Compensation for Services by Will*.—A promise to make a devise to one who has rendered services to the promisor at his request, as a compensation for such services, is a valid promise, for a breach of which an action will lie. *Caviness v. Rushton*, 500

CONVERSION.

See ATTACHMENT, 2.

CONVEYANCE.

See DEDICATION, 5; DEED; DESCENT, 1; FRAUDULENT CONVEYANCE; LANDLORD AND TENANT, 6; PARTNERSHIP; SHERIFF'S SALE, 6.

CORPORATION.

See SCHOOLS.

Foreign.—Filing Authority of Agents with County Clerk.—Statute Construed.—Sections 3022 and 3023, R. S. 1881, providing that the agents of a foreign corporation, before entering upon their business as such, shall file evidence of authority with the clerks of the counties in which it is proposed to do business, contemplate only such agents as propose to transact, within this State, the business in which the corporation is engaged, and do not apply to persons who are engaged in appointing agents to do its business. *D. S. Morgan & Co. v. White*, 418

COSTS.

See DRAINAGE, 1; JUDGMENT, 6.

COUNTER-CLAIM.

See MORTGAGE, 19.

COUNTY AUDITOR.

See MORTGAGE, 6, 10; RAILROAD, 1; SCHOOL FUND.

COUNTY CLERK.

See CORPORATION; CRIMINAL LAW, 14; EXECUTION; MORTGAGE, 11.

Compensation for Official Services.—Before a county clerk is entitled to demand compensation from the county treasury for services performed by him in his official capacity, he must show, first, a statute authorizing him to receive compensation for such services and fixing the amount thereof, and, second, a statute authorizing the county commissioners to pay for such services out of the county treasury.

Noble v. Board, etc., 127

COUNTY COMMISSIONERS.

See BOARD OF HEALTH; COUNTY CLERK; GRAVEL ROAD; HIGHWAY, 1, 2; MANDAMUS; NEGLIGENCE, 1, 2, 4; RAILROAD, 1; SCHOOL FUND.

1. *Constitutional Law.—Inferior Courts.—Jurisdiction.—Appeal*.—Under section 1, of article 7, of our State Constitution of 1851 (section 161, R. S. 1881), it was competent for the General Assembly to provide by law

that the board of commissioners of each county should constitute a court of inferior jurisdiction, and to clothe such court, as has been done, with original jurisdiction and judicial power over claims and accounts against the corporate county, and other matters of local interest, providing for appeals from its decisions to courts of superior jurisdiction.
State, ex rel., v. Board, etc., 69

2. *Practice.—Claim against County.—Jurisdiction of County Board.—Appeal.—Res Adjudicata.*—Under sections 5758, 5759 and 5760, R. S. 1881, in force since May 31st, 1879, the board of commissioners of the county has exclusive original jurisdiction of any claim against such county, and the decision of such board either for or against such claim, if not appealed from as provided by law, is final and conclusive, and the adjudication may be pleaded in bar of another suit on such claim. *Id.*
3. *Statute Construed.*—The sessions of the board of commissioners, pursuant to section 4441, R. S. 1881, are held for the sole purpose of receiving from the school trustees the reports therein provided for and taking action thereon, and the board has no power to transact any other business.
Fahlor v. Board, etc., 167
4. *Claims Against County.—Jurisdiction of County Board.—Repeal of Act by Implication.*—The act of 1852 (section 5771, R. S. 1881), providing that a claimant might either appeal from the decision of the board of county commissioners disallowing his claim, or bring an original action against the county, was repealed by implication by the act of 1879 (Acts 1879, p. 106), and the only manner in which the circuit court can acquire jurisdiction of such a claim, whatever its nature, is by appeal from a decision of the board. *Board, etc., v. Maxwell, 268*
5. *Claim Against County.—Pleading.*—A statement of a claim which is sufficient to inform the board of commissioners of what is demanded, and to bar another claim for the same thing, without averring all the facts necessary to be proved in order to establish the claim, is sufficient on motion to dismiss, both before such board and in the circuit court on appeal.
Duncan v. Board, etc., 403
6. *Same.—Contract to Examine Treasurer's Accounts.*—The board of county commissioners have power to contract for an examination and adjustment of the accounts of the county treasurer, and an action may be maintained against the county on such contract. *Id.*

COUNTY RECORDER.

See MORTGAGE, 10, 11.

COUNTY TREASURER.

See COUNTY COMMISSIONERS, 6; RAILROAD, 1; TAXES, 3, 4.

COURTS.

See COUNTY COMMISSIONERS, 1.

Judicial Knowledge.—Counties.—The courts of a State take judicial notice of the geography of its counties, their boundaries and the location of towns therein.
Louisville, etc., R. W. Co. v. Hixon, 337

COVENANTS.

See DEED, 4, 5; LANDLORD AND TENANT, 6.

CRIMINAL LAW.

See INSTRUCTIONS TO JURY, 3; INTOXICATING LIQUOR; MARRIAGE, 2.

1. *Abortion.—Indictment.—Duplicity.*—Where an indictment is not entirely formal in all its parts, but may be construed as merely averring specifically that the death of the woman was caused by the efforts of the defendant to procure an abortion, such indictment is not bad for

duplicity in charging abortion and also involuntary manslaughter in the same count. *Traylor v. State, 65*

2. *Same.—Evidence.—Order of Proofs.—Corpus Delicti.*—To sustain a criminal charge, proof of two distinct propositions must be made, first, that the act constituting the essence of the offence was done, and, second, that it was done by the person charged. In regular order, evidence tending to implicate the party on trial ought not to be introduced until the principal fact, the *corpus delicti*, has been established, and to sustain a conviction it ought to be proved beyond a reasonable doubt. *Ib.*
3. *Same.*—In a prosecution for procuring an abortion resulting in the death of the pregnant woman, it is the procurement of the miscarriage that constitutes the *corpus delicti*. *Ib.*
4. *Rape.—Locus of Crime.—Evidence.*—In a prosecution for rape committed upon a female child under the age of twelve years, where the prosecuting witness testified on her examination before a justice, that the crime was committed in a certain field, but on the trial of the cause in the circuit court testified that it occurred in the defendant's barn, it is error to reject evidence tending to show the motives inducing the change of the *locus* of the crime. *Bessette v. State, 85*
5. *Same.—Prosecuting Attorney.—Argument of Counsel.*—It is the duty of the trial court to control and direct the argument of counsel; and where the prosecuting attorney is permitted, over objection, to comment on the personal appearance of the defendant, not as a witness, nor on account of his manner and bearing as such, but as indicating a probability of guilt, or to refer to a particular juror as having become prejudiced in the case, it is such error as will reverse the judgment. *Ib.*
6. *Indictment.—Surplusage and Repugnancy.*—An indictment which is otherwise sufficient is not bad, under the statute, because of any surplusage or repugnant allegations which do not affect the substantial rights of the defendant upon the merits. *Myers v. State, 379*
7. *Same.—Forgery.—When Purport Clause Unnecessary.*—Where an indictment charges the forgery of "a certain order, purporting to have been made and executed by one Vincent T. West," and following this charge the order is set out *in hæc verba*, and according to its tenor it was signed "Dr. West," the purport clause will be regarded as surplusage, and disregarded. *Ib.*
8. *Same.—Misspelled Word.*—Where an indictment charges the forgery of an order for goods and chattels, and the order, as set out, is for "\$3.00 of *grociars*," the misspelling does not render the indictment bad. *Ib.*
9. *Practice.—Bill of Exceptions.*—In criminal cases, leave to file a bill of exceptions must be asked and obtained during the trial, and leave asked and obtained ten days after final judgment is too late, as the judgment terminates the trial. *Hunter v. State, 406*
10. *Practice.—Indictment.—Motion to Strike Out.*—A motion to strike out part of an indictment is not recognized by the rules of practice in criminal cases. *Gallaher v. State, 411*
11. *Same.—Instructions.—What Record Must Contain.*—Instructions are regarded as an entirety, and where error is alleged in the giving of instructions the record must show that there was error in the instructions taken as a whole. It is, therefore, necessary for the record to contain so much of the instructions at least as affirmatively shows error, and the better practice is to embody all the instructions in the record. *Ib.*
12. *Same.—Evidence.—Riot.—Res Gestæ.*—The acts and declarations of per-

sons engaged in the commission of a riot are admissible against them as part of the *res gesta*, although such evidence may also show the malicious destruction of property. *Id.*

13. *Larceny.—Indictment.*—The charging part of an indictment reads thus: "Jonathan W. Heath, late of said county, on the 13th of August, 1880, at the county and State aforesaid, did then and there, two head of cattle, commonly called steers, of the value of sixteen dollars each, of the goods and chattels of William Osborn, then and there being found, did feloniously steal, take and drive away."

Held, that, although inartistically drawn, the indictment was sufficient.

Heath v. State, 512

14. *Same.—Failure to Record Indictment.*—The failure of the clerk to enter the indictment in the order-book can not be made the ground of a motion to quash. *Id.*
15. *Same.—Return of Indictment.*—A recital in the record, that the grand jury come into open court and present an indictment, followed by an indictment, is sufficient to show its due return. *Id.*
16. *Same.—Exceptions.—Bill of Exceptions.*—A defendant who flees to escape judgment, and remains out of the jurisdiction of the court for two years, can not have exceptions entered, nor can he secure a bill of exceptions after such a lapse of time. *Id.*
17. *Title of Acts of Legislature.*—The title "An act concerning public offences and their punishment," is sufficiently comprehensive to include all crimes and misdemeanors. *Hedderich v. State*, 564
18. *Same.*—A provision in a statute, prescribing a penalty of fine and imprisonment against one who does a designated act, is a sufficient declaration that the prohibited act is unlawful. *Id.*
19. *Same.—Definition of Crime.*—It is sufficient if an offence is so defined as to convey to the mind of a person of ordinary intelligence adequate information of the evil intended to be prohibited. *Id.*

CROSS-EXAMINATION.

See EVIDENCE, 3, 16; WITNESS, 1 to 3, 5.

CUSTOM.

See EVIDENCE, 24.

DAMAGES.

See ATTACHMENT, 3; DRAINAGE, 18; HUSBAND AND WIFE, 3 to 6; LANDLORD AND TENANT, 3 to 5; NEGLIGENCE, 1, 6; REAL ESTATE, 3, 6; VERDICT, 3.

DECEDENTS' ESTATES.

See HUSBAND AND WIFE, 1; WITNESS, 6.

1. *Sale of Lands.—Liens.*—Where, upon an order of court generally to sell lands to make assets for the payment of debts, there is a sale, the purchaser takes title subject to all liens, though he did not give the bond required by statute, R. S. 1881, section 2350, conditioned for their payment. *Mussey v. Jerauld*, 270
2. *Creditors.—Widow.—Sale of Real Estate.*—Creditors have no right to an order for the sale of the widow's interest in the lands of her deceased husband to pay debts due from his estate. *Clark v. Deutsch*, 491
3. *Same.—Jurisdiction.—Order of Sale.*—An order, directing the sale of the widow's interest in the lands of her deceased husband to pay the debts due from his estate, is beyond the power of the jurisdiction of the court, and is void. *Id.*
4. *Contract of Decedent and Another.—Action Thereon.—Statute Construed.*—Under the provisions of section 2311, R. S. 1881, an action can not

be commenced by complaint and summons against an executor or administrator and any other person or persons, or his or their legal representatives, upon any contract executed jointly, or jointly and severally, by the decedent and such other person or persons; but the holder of such contract can enforce its collection against the estate of such decedent only by filing his claim thereon, as provided in section 2310, R. S. 1881. *State, ex rel., v. Cunningham, 461*

DECLARATIONS.

See CRIMINAL LAW, 12; EVIDENCE, 7; HUSBAND AND WIFE, 4.

DEDICATION.

1. *Streets.—Plats.—Commissioners in Partition Proceedings.*—It is competent for commissioners in partition proceedings, acting under the orders of a court of competent jurisdiction, to make a subdivision of the land into lots, and to dedicate streets and alleys to the public on the plats made by them. *City of Indianapolis v. Kingsbury, 200*
2. *Same.—Guardian's Authority to Dedicate.*—A guardian of an infant has authority, when so ordered by a court of competent jurisdiction, to subdivide the lands of the ward and to dedicate streets and highways to the public. *Ib.*
3. *Same.—Plat.—What Indicates Dedication.*—When the shape, lines and dimensions of a space marked on a recorded plat indicate that it is a street, there is a valid dedication of the space so indicated, although there are no formal words of dedication, and although the space is not in express terms designated as a street. *Ib.*
4. *Same.—Continuing Way on Second Plat.*—Where the land-owner makes and records a plat, on which there are lines marking a way, and he afterwards makes and records a second plat on which the way is continued of the same width as on the first plat and is marked "Highland street," and lots are sold with reference to such plats, it will be conclusively presumed that the way throughout its entire length is a public one. *Ib.*
5. *Same.—Rights of Abutting Owners.*—The conveyance of land bounded by a street conveys the fee to the center of the street, and also conveys an interest in the street, as a street, of which the abutter can not be deprived except by seizure under the right of eminent domain. *Ib.*
6. *Same.—Plat.—Right of Lot Owners to Streets.*—Purchasers of lots have a right to have all the streets marked on the plat by which they purchased kept open as streets, and their rights are not confined to the part of the street in front of the lots purchased by them. *Ib.*
7. *Same.—Implied Dedication.*—It is not necessary that a dedication should be evidenced by a writing, but it may be presumed from the acts and conduct of the owner. *Ib.*
8. *Same.—Intent.*—It is necessary, to constitute a valid dedication, that there should be an intent to dedicate the land to a public use, but the intent which the law regards is that which the open acts of the owner indicate and not a secret intent. *Ib.*
9. *Same.—When Intent Inferred.*—Where the acts and conduct of the land-owner are such as fairly and naturally lead to the conclusion that he intended to dedicate the land to the public use, and others have in good faith acted upon his open acts and conduct, he will not be permitted to aver that there was no dedication, but the law will conclusively infer that he intended what his acts and conduct indicated. *Ib.*
10. *Same.—Plat.*—Where ways are shown on recorded plats and there appear as streets, they will be so regarded, unless there is in the plats an express provision to the contrary, and no acts or conduct of the owner can change the effect of the dedication evidenced by the plat. *Ib.*

11. *Same.—Intent to Dedicate.—When it may be Rebutted.*—An intention to dedicate may be rebutted when there is an implied dedication, but not when there is an express dedication. *Ib.*
12. *Same.—Rebutting Presumption of Dedication.—Evidence.*—One of the usual methods of rebutting the presumption of dedication is by evidence that a gate was swung across the way, but this will not rebut an intent to dedicate in case of an express dedication, nor will it do so in cases of implied dedication where the other evidence in the case shows that there was an intent to dedicate and that rights were acquired upon the faith that such an intent did in fact exist. *Ib.*
13. *Same.—User.—Time.*—User by the public, with the consent of the owner, for such length of time that public accommodation and private rights might be materially affected by an interruption of the enjoyment, is sufficient to raise a presumption that the owner intended a dedication to the public. *Ib.*
14. *Same.—Change of Private Way to Public.*—A private way, no matter how long or how much used by the public, can not be transformed into a public way without the consent of the owner, but when the owner does consent, and the public accepts, the change may be made. *Ib.*
15. *Same.—Partition.—Married Woman.*—Where proceedings in partition are pending, and one of the parties marries, the validity of the dedication made by the commissioners will not be affected by such marriage. *Ib.*
16. *Same.*—A dedication may, in some cases, be presumed against a married woman, although there is no formal deed executed by herself and husband. *Ib.*
17. *Same.—Questions of Law and Fact.*—Whether land was or was not dedicated to the public is not a conclusion of law, but is a question of fact to be decided upon the evidence. *Ib.*

DEED.

See DESCENT, 1; EVIDENCE, 10, 11; FRAUDULENT CONVEYANCE, 2; JUDGMENT, 1; LANDLORD AND TENANT, 6; MORTGAGE; REAL ESTATE, 6; REAL ESTATE, ACTION TO RECOVER, 1; SHERIFF'S SALE, 6.

1. *Condition Subsequent.—Forfeiture.—Waiver.—Parol Assent to Breach.*—A condition subsequent in a deed of conveyance of real estate may be waived by one who has a right to enforce it, and a forfeiture may be saved though a condition has been broken, if the party having such right waives it, which he may do by acts as well as by an express agreement; but mere silence in or parol assent to an act which constitutes a breach of an express condition in a deed, does not amount to a waiver of the right of forfeiture for such breach.

Carbon Block Coal Co. v. Murphy, 115

2. *Same.—Pleading.*—In an action to recover possession of and to quiet title to certain real estate for breach of a condition subsequent in a deed, an answer substantially showing the parol assent of an alleged agent to the act constituting the breach, and no consideration for the agreement, does not sufficiently allege a waiver thereof, and is bad on demurrer. *Ib.*
3. *Delivery.—Acceptance.—Recording.*—It is essential to the valid delivery of a deed that it should be accepted by the grantee, and if the deed is beneficial to the grantee and is recorded, an acceptance will be presumed, but this presumption may be rebutted.

Bremmerman v. Jennings, 253

4. *Covenants.—Encumbrance.*—The covenant in a deed against encumbrances runs with the land, and where a remote grantor is compelled to discharge the encumbrance to protect his title, he may sue thereon. *Fisher v. Parry, 68 Ind. 465, distinguished. Dehority v. Wright, 382*

5. *Same.—Evidence.—Defence.*—In a suit upon covenant against encumbrances in a deed, to recover on account of one paid off by the plaintiff, it is no defence that there was still an older one unpaid. *Ib.*
6. *Same.—Description.—Reformation.—Pleading.*—A prayer to reform a deed as to description is not necessary to make a complaint for that purpose good on demurrer. *Ib.*

DEFAULT.

See DRAINAGE, 13.

DELIVERY.

See CONTRACT, 9; DEED, 3; EVIDENCE, 11, 25; FRAUDULENT CONVEYANCE, 1.

1. *'Sale.—Duty of Seller.*—When the goods are sold upon an order from a buyer living at a place distant from the seller, and the latter undertakes to ship them, it is his duty to deliver them to the carrier, properly consigned. *Sohn v. Jervis, 578*
2. *Same.—Consignment to Seller.—Right of Buyer.*—It is the duty of a seller to consign goods to the buyer, unless there is some different agreement, and a seller who consigns goods to himself does not deliver them to the buyer. Where the goods are consigned to the seller, the buyer is not obliged to take them from the carrier, nor is he bound to make inquiry of the carrier for goods not consigned to him. *Ib.*

DEMAND.

See GRAVEL ROAD, 7; PROMISSORY NOTE, 3.

DEMURRER TO EVIDENCE.

1. *Practice.*—By demurring to the evidence, the party demurring withdraws from the consideration of the court whatever is favorable to himself, admits as true all facts against him of which there is any evidence, and consents that whatever reasonable inferences can, shall be drawn from the evidence against him. *Stockwell v. State, ex rel., 1*
2. *Same.*—Upon such demurrer, the court will infer from the evidence every conclusion that a jury could reasonably have inferred. *Ib.*
3. *Same.—Objections to Evidence.*—By demurring to the evidence, the party demurring waives all objections to its admissibility. *Ib.*
4. *Same.—Motion for New Trial.—Waiver.*—When there has been a demurrer to the evidence, a motion for a new trial presents no question. *Ib.*
5. *Same.—Defects in Pleadings.*—Defects in pleadings will not be considered as a reason for sustaining a demurrer to the evidence. *Ib.*
6. *Practice.—Effect of Failure to Prove an Essential Fact.*—A party who has not the burden of proof may demur to the evidence, and if there is an entire failure to prove one fact essential to the existence of the cause of action, the demurrer should be sustained.

Lyons v. Terre Haute, etc., R. R. Co., 419

DEPOSITION.

See CONTINUANCE.

DESCENT.

See MORTGAGE, 23; PARTITION, 4.

1. *Widow.—Childless Second Wife.—Forced Heirs.—Estoppel.—Quitclaim.*—Where an owner of real estate dies, leaving a widow by whom he has no children, and leaving children by a previous wife, the widow, under section 2483, R. S. 1881, takes a portion of the deceased husband's real estate in fee simple, free from all demands of his creditors, and, under section 2487, R. S. 1881, such children, at her death, become her forced heirs as to the land so acquired by her, which descends to them without

regard to any conveyance she may have made. Improvements placed thereon by her inure to their benefit at her death, as do also improvements made thereon during her life by one in possession under her conveyance taken with knowledge of the facts. During her life, the quitclaim of adult children of such decedent, or the conveyance under order of court of the guardian of his minor children, can not convey any estate in the widow's portion; nor will such children be estopped from asserting title to such portion, after her death, by such conveyances and the receipt by them during her life of the purchase-money therefor, especially where the purchaser had notice of the facts.

Bryan v. Uland, 477

2. *Same.*—*Partition.*—*After-Acquired Title.*—The judgment, whatever its form, in a suit for the partition of the deceased husband's real estate, between such widow and children, the title not being in issue, could not affect the interest acquired by the children as forced heirs, upon the death of the widow. *1b.*

DESCRIPTION.

See DEED, 6; MORTGAGE, 5, 20, 21; REAL ESTATE, ACTION TO RECOVER, 1.

DESERTION OF WIFE.

See HUSBAND AND WIFE, 8.

DEVISE.

See CONTRACT, 10; WILLS, 1, 4.

DILIGENCE.

See ADOPTION, 4; CONTINUANCE, 1; PRINCIPAL AND SURETY, 3; SHERIFF'S SALE, 4.

DISCRETION.

See BOARD OF HEALTH, 5; HIGHWAY, 4; PRACTICE, 17; SUPREME COURT, 7.

DIVORCE.

1. *Notice by Publication.*—*Inhibition to Marry Within Two Years.*—*Marriage in Violation of Decree Voidable Only.*—Where a divorce is obtained on notice by publication merely, and the decree, as required by section 1030, R. S. 1881, forbids the party obtaining such divorce to marry within two years, but such party, in violation thereof, does marry within that time, the marriage is unlawful and voidable, but, under the statute of this State, not absolutely void. It will become void, however, if, within the period inhibited, the decree is opened by the the party against whom it was obtained. *Mason v. Mason, 25*
2. *Marriage.*—*Public Policy.*—*Construction of Statutes.*—When the marriage relation is once entered into, it is the policy of the law to uphold its validity by every reasonable intendment; and to sustain a marriage not inexorably void, a statute seemingly mandatory will sometimes be construed as merely directory. *1b.*
3. *Same.*—*Ratification of Unlawful Marriage.*—*Estoppel.*—In violation of a decree of divorce that she should not marry within two years from the time of its rendition, a woman married again, and after living with her husband four years brought an action for divorce, to which the defence was interposed that the marriage was unlawful because in violation of the decree of divorce from her former husband. *Held*, that as it did not appear that the defendant was ignorant of the inhibition at the time of his marriage with plaintiff, and as he ratified the marriage by living with her two years after the inhibited period had expired, he was estopped from denying the validity of the marriage as a defence to the complaint. *1b.*

DONATION.

See GRAVEL ROAD, 6, 7.

DRAINAGE.

1. *Withdrawal of Part of Remonstrants.*—Where, in a drainage proceeding, a number of persons join in a remonstrance, any of them may afterwards withdraw therefrom, and thereby escape liability for costs thereafter created in consequence of the remonstrance; but such action will not defeat the remonstrance, nor impair or defeat, in any manner, the right of the other remonstrants to proceed as if such withdrawal had not occurred. *Munson v. Blake, 78*
2. *Same.—Verification of Remonstrance.*—The statute does not require that the remonstrance shall be personally verified by the remonstrants, but it may be verified by them, or by some person having authority to act for them, and if verified by one or more, but not by all of the remonstrants, either personally or by agent, such verification will be treated and regarded as made by all, and if, after the remonstrance is filed, those who verified it withdraw therefrom, such act will not operate as a withdrawal of the verification, but this will remain unaffected thereby. *Ib.*
3. *Same.—Time Fixed for Report of Commissioners.—Statute Construed.*—The provision of the statute, R. S. 1881, section 4275, requiring the court to designate a certain time for the drainage commissioners to report, is mandatory and should be strictly enforced, but the court may, for good cause shown, extend the time first fixed to another definite day. *Ib.*
4. *Same.—Objection must be Made Below.*—An objection that the report was not filed at the time fixed comes too late when made for the first time in the Supreme Court. *Ib.*
5. *Same.—Effect of Delay of Commissioners' Report on Right of Remonstrants.*—Where the commissioners' report is not filed at the time fixed, and a remonstrance is offered within the statutory period after the actual filing of the report, the court should permit such remonstrance to be filed.
6. *Same.*—Where it is shown by affidavit that the wrongful action of the commissioners prevented the filing of a remonstrance at an earlier period, the court should permit its filing at the time presented. *Ib.*
7. *Same.—Appeal.—Presumption as to Name of Parties.*—Where, in proceedings for the establishment of a ditch, parties signed a remonstrance as "Hosmer & Hildreth," and were afterwards assessed, and an appeal was taken by Stephen R. Hosmer and Charles C. Hildreth. *Held*, that it should be assumed that the appellants were, or represented, the same parties as those assessed, and therefore had a right to appeal. *Ib.*
8. *Same.—Waiver.—Supreme Court.*—Where a motion is made to dismiss an appeal because co-remonstrants were not joined therein, an agreement by the parties to submit the cause, without insisting that the others should be made co-parties, waives the objection. *Ib.*
9. *Statute Construed.*—The act of 1881 concerning drainage, R. S. 1881, sections 4273-4284, was amended, but not repealed, by the act of 1883, but the latter controls the proceedings after it took effect. *Moss v. State, ex rel., 321*
10. *Same.—Complaint.—Exhibits.*—Under the act of 1881 the assessment made by the commissioner charged with the construction of the work constitutes a lien on the land, and a copy thereof must be exhibited with the complaint; but where the amendatory act of 1883 was in force when the court acted upon the report of the commissioners, that

- report as approved and confirmed or modified by the court must be the exhibit, and in any case the notice recorded is not the proper exhibit. *Id.*
11. *Assessment. — Commissioner. — Complaint. — 'Relator.'* — Where suit is brought under section 4, Acts 1883, p. 178, to enforce a ditch assessment, it is not necessary for the complaint to allege that the commissioner had determined to bring suit. And if the complaint shows beyond question that the suit is in the name of the State, for the use of the commissioner, to enforce a ditch assessment, the mere fact that the commissioner has styled himself "relator" therein does not change the character of the action, or impair the legal effect of material averments. *McKinney v. State, etc., 355*
 12. *Same. — Delivery of Copies of Petition and Order of Reference. — Presumption.* — The delivery by the clerk of copies of the petition and order of reference to the commissioners of drainage is not jurisdictional, and the statute conclusively presumes it to have been done, after the assessments have been confirmed and the work established; and the fact can not be disputed by an answer. *Id.*
 13. *Same. — Effect of Default.* — Under section 383, R. S. 1881, a default does not admit the amount claimed to be due; it merely admits the material and traversable averments of the complaint, and that something is due the plaintiff, leaving the amount to be established by proof, and this applies to defaults in suits for enforcing ditch assessments. *Id.*
 14. *Report of Commissioners. — Expense and Benefits.* — Under section 2 of the act of March 8th, 1883 (Acts 1883, p. 173), the commissioners of drainage are only required to report that the estimated expense of the proposed drain will be less than the supposed benefits, and the difference between a total expense of \$2,855 and aggregate benefits of \$2,912 is sufficient. *Roberts v. Giersa, 408*
 15. *Same. — Practice. — Supreme Court.* — An objection to the confirmation of the report of commissioners of drainage can not be raised for the first time in the Supreme Court. *Id.*
 16. *Lien of Assessments Under Act of March 8th, 1883.* — Under the drainage act of March 8th, 1883, the lien of assessments attaches upon the approval by the court of the assessments made by commissioners of drainage, and such lien relates back to the filing of the petition. *Cook v. State, etc., 446*
 17. *Same. — Priority of Mortgage Lien.* — But where, before the approval by the court of such assessments, the lien of a mortgage, executed to a person who was not a party to, and had no notice of, the drainage proceeding, has attached to property assessed as benefited, it will have priority over the assessment lien. *Id.*
 18. *Right of Property Owner not Assessed with Benefits or Damages to Remonstrate.* — A property owner whose land will be injured by the construction of a ditch has a right to appear and remonstrate, although no damages are assessed in his favor, and although no benefits are assessed against his land. *Reasoner v. Creek, 482*
 19. *City. — Drainage Commissioners.* — The cities of this State have exclusive jurisdiction of the matter of drainage within their limits, and there is no authority for the construction of drains in cities by drainage commissioners, under the direction of the circuit court. *Anderson v. Endicutt, 539*
 20. *Petition and Verification. — Motion to Dismiss. — Error.* — Where the petition for drainage and the verification thereof substantially follow the forms given in section 4284, R. S. 1881, there is no error in overruling a motion to dismiss the petition and proceedings for want of formality in the verification. *Shields v. McMahan, 591*

DUPLICITY.

See CRIMINAL LAW, 1.

DURESS.

See FALSE IMPRISONMENT, 1.

EJECTMENT.

See JUDICIAL SALE; REAL ESTATE, ACTION TO RECOVER.

ELECTION.

1. *Office and Officer.—Township Trustee.*—The right to the office of township trustee is ultimately decided by the ballots, and not upon the certificate of election, and the eligible candidate receiving the highest number of votes cast is entitled to the office. *State, ex rel., v. Shay, 36*
2. *Quo Warranto.—Right to Try Title to Office.*—A defendant in a *quo warranto* proceeding is not bound to confine the controversy to the single question as to the effect of the certificate of the election officers, but has a right to assert, by answer, his title to the office, and to show that he was the eligible candidate who received the highest number of votes; nor is he obliged, when proceeded against by an information in the nature of a *quo warranto*, to yield up the office and resort to the statutory remedy for trying title to office, where a "re-count" of the votes shows that he was duly elected. *Ib.*
3. *Same.—Evidence.—Ballots.*—It is proper on the trial of an issue joined on an information in the nature of a *quo warranto*, to try the title to an office, to introduce in evidence the ballots cast at the election. *Ib.*
4. *Same.—Entries of Public Officers.*—It is proper to give in evidence the entries of public officers made in the discharge of public duties, and this rule applies to an endorsement by the inspector of the election made upon a bag containing ballots. *Ib.*
5. *Same.—"Re-Count" of Votes.*—The statute authorizes the circuit court to order a "re-count" of ballots cast at an election. *Ib.*
6. *Same.—Evidence.—Certificate of Commissioners.*—The certificate of the commissioners appointed by the circuit court to recount the ballots cast at an election is competent evidence. *Ib.*

EMINENT DOMAIN.

See DEDICATION, 5.

EQUITY.

See ADOPTION, 4; APPEAL BOND, 3; HUSBAND AND WIFE, 1, 7; PRACTICE, 16.

ESTOPPEL

See DESCENT; DIVORCE, 3; GRAVEL ROAD, 2; PROMISSORY NOTE, 1; WILLS, 4.

EVIDENCE.

See BASTARDY; BILL OF EXCEPTIONS; CONTRACT, 9; CRIMINAL LAW, 2, 4, 12; DEDICATION, 12, 17; DEED, 5; DEMURRER TO EVIDENCE; ELECTION, 1 to 4, 6; EXECUTION, 2; FRAUD, 5; GUARDIAN AND WARD, 1, 2; HUSBAND AND WIFE, 3 to 6; INSTRUCTIONS TO JURY, 1, 4; INTOXICATING LIQUOR, 1 to 3; JUDGMENT, 4, 6; LANDLORD AND TENANT, 3 to 5; MARRIAGE, 4; MASTER COMMISSIONER; MORTGAGE, 11; NEGLIGENCE, 5; NEW TRIAL, 1 to 4, 6; PRACTICE, 8, 11 to 13, 15, 20, 26, 33; PROMISSORY NOTE, 2; RAILROAD, 8; REAL ESTATE, 1; REAL ESTATE, ACTION TO RECOVER, 1 to 3; SLANDER; SUPREME COURT, 1, 3, 5; WITNESS.

1. *Parol*.—Title to real estate may be proved by parol, where such evidence is not objected to. *Stockwell v. State, ex rel., 1*
2. *Refusal to Admit Testimony of Witnesses.—Practice*.—Questions upon the refusal to admit evidence from a witness can only be saved by propounding to the witness some pertinent question, and, upon objection made, stating to the court, as it may direct, the testimony which such witness would give in answer thereto. *Judy v. Citizen, 18*
3. *Witness.—Contradictory Statements.—Evidence of, for Impeachment Only*.—The contradictory statements of a witness, introduced on cross-examination to impeach him, can only be considered for that purpose, and can not be regarded as substantial proof of the facts in dispute between the parties. *Allen v. Davis, 187*
4. *Same*.—The contradictory statements of a husband, in the absence of his wife, on a former trial between other parties, about the property for which the note and mortgage in suit were given, while competent for the purpose of impeachment, are not evidence against the wife in this suit. *Ib.*
5. *Admissions of Husband*.—The declarations of a husband that he is the owner of land claimed by his wife are admissible upon the question of his credibility as a witness, but they do not bind the wife. *Brennmerman v. Jennings, 253*
6. *Harmless Error*.—The admission of improper evidence is harmless, where it appears that there was other undisputed evidence given clearly proving the only fact upon which the improper evidence could have borne. *Naugle v. State, ex rel., 284*
7. *Acts, Declarations and Representations of Co-Conspirator*.—The acts, declarations and representations of an alleged conspirator are not binding upon absent parties, nor competent evidence against them, until there has been proof of a conspiracy; but when that is established, such acts, declarations and representations become competent evidence against all parties shown to have been connected with such conspiracy, if in furtherance of that object. *Wolfe v. Pugh, 293*
8. *Practice.—Supreme Court.—Error Compensatory*.—A party, upon whose objection evidence admissible for either party has been excluded, will not be heard by the Supreme Court to complain of a subsequent exclusion of like evidence offered by him. *Hinton v. Whittaker, 344*
9. *Practice.—Offer of Competent and Incompetent Evidence*.—It is not the duty of the court, where evidence is offered in a body, to sift the competent from the incompetent, but it is the duty of counsel to offer only competent evidence. *Cuthrell v. Cuthrell, 375*
10. *Same.—Deed.—Consideration*.—The real consideration of a deed may be shown by parol testimony. *Ib.*
11. *Same.—Deed.—Delivery*.—It is competent to prove by parol the terms and conditions upon which a deed was to be delivered in cases where there is no absolute delivery, and no consideration is paid by the grantee. *Ib.*
12. *Same.—Quieting Title*.—It is proper for a plaintiff, in an action to quiet title, to prove claim of title by the defendant, and to show that the claim is unfounded. *Ib.*
13. *Lost Record.—Reinstatement of*.—A record of a proceeding to reinstate a lost record, which shows an appearance and then a default, and recites that process had been duly issued and served, as appears by the sheriff's return, is good, and is admissible in evidence. *Dehority v. Wright, 382*
14. *Objections to Admissibility of.—Practice*.—Objections to the admissibility of evidence, upon the ground that it is not competent, material or

- relevant, presuppose a legal traversable issue, and they are to be disposed of upon such assumption. *Louisville, etc., R. W. Co. v. Fox*, 416
15. *Same.—Jurisdiction.—Supreme Court.*—A question as to the admissibility of evidence, based upon the ground that the trial court had no jurisdiction of the subject-matter, can not be raised for the first time in the Supreme Court. *Ib.*
 16. *Cross-Examination.—Harmless Error.*—Where a witness is fully cross-examined, an erroneous ruling, denying the right to ask one question on cross-examination, is a harmless error. *Tomlinson v. Briles*, 538
 17. *Same.—Contract.—Written and Verbal.*—Although a contract partly written and partly oral is a mere verbal contract, still the writing is competent evidence. *Ib.*
 18. *Parol Evidence to Explain Record.—Plea in Abatement.—Pending Prior Action.—Variance.*—Where the pendency of a prior action is pleaded in abatement, and the record, which is offered to sustain the plea, shows a difference in the names of the plaintiffs in the two actions, parol evidence to explain the variance is not admissible without an averment in the plea that such plaintiffs are one and the same. *Morris v. State, ex rel.*, 560
 19. *Same.—Admissions.—Instruction.*—An instruction, to the effect that oral admissions by a party should be received with great caution, because the witness may not have correctly understood them or may not have recollected them, is erroneous. *Ib.*
 20. *Assumption of Fact as Ground of Objection.*—Where there is a controversy as to the existence of a given fact, counsel have no right to assume its existence as the basis of an objection to evidence. *Sohn v. Jervis*, 578
 21. *Same.—Leading Questions.*—It is only where it plainly appears that the trial court abused its discretion in permitting leading questions to be asked, that the Supreme Court will interfere; and there is no abuse of discretion in permitting leading questions upon merely introductory matters. *Ib.*
 22. *Same.—Practice.*—Courts are not bound to sift evidence offered in mass, to select the competent from the incompetent, but it is the duty of counsel to offer only competent evidence. *Ib.*
 23. *Same.—Contract.*—Where the price of an article is fixed by contract, that price governs, and evidence of the market value of the property is incompetent. *Ib.*
 24. *Same.—Custom.*—Where there is an express contract, the rights of the parties must be determined by the contract, and they can not be varied by a custom which contravenes the rules of law. *Ib.*
 25. *Delivery of Goods May be Inferred from Circumstances.*—In an action to recover the value of goods sold and delivered, the delivery need not necessarily be proved by direct evidence, for it may, like any other fact, be inferred from circumstances. *Lance v. Pearce*, 595

EXECUTION.

See CONSTABLE; REAL ESTATE, ACTION TO RECOVER, 2; REPLEVIN; SHERIFF'S SALE.

1. *Affidavit.—Justice's Judgment.—Transcript.*—An affidavit filed with the clerk to obtain execution on the transcript of a justice's judgment need not show non-payment to the clerk. *Dehority v. Wright*, 382
2. *Same.—Evidence.—Certificate.*—In such case the fact that the justice made and filed with the clerk a certificate before execution issued may be proved by parol. *Ib.*

EXECUTOR.

See DECEDENTS' ESTATES; WILLS, 1, 4.

EXHIBITS.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; DRAINAGE, 10; PLEADING, 8, 16, 18.

FALSE IMPRISONMENT.

1. *Pleading*.—A complaint, alleging that the defendants locked the plaintiff up in a room, and by threats of violence, with weapons in hand, compelled him to confess that he had made and violated a certain promise of marriage, and extorted from him an agreement to pay a sum of money for the breach thereof, sufficiently charges false imprisonment. *Hildebrand v. McCrum*, 61
2. *Same*.—*Res Adjudicata*.—*Breach of Promise*.—In such case, an answer, alleging that an action had been brought by one of the defendants against the plaintiff for a breach of promise of marriage, wherein the matters and things complained of in the present suit had been fully adjudicated and determined, is insufficient, since the matter of the false imprisonment could not have been adjudicated therein. *Id.*
3. *Same*.—*Demurrer*.—*Defect of Form*.—*Harmless Error*.—To such answer, a demurrer, alleging that the same did not "state facts sufficient to constitute a bar to the plaintiff's complaint," can not be sustained over the objection of the defendant. Yet, when it appears that the error in sustaining such a demurrer is harmless, such error will not justify a reversal of the final judgment. *Id.*

FENCE.

See RAILROAD, 2, 8 to 10.

FEES AND SALARIES.

See SHERIFF.

FORECLOSURE.

See CHATTEL MORTGAGE; INSURANCE; JUDGMENT, 2; MORTGAGE; SCHOOL FUND.

FORCIBLE ENTRY AND DETAINER.

See REAL ESTATE, 3.

FOREIGN CORPORATION.

See CORPORATION.

FORFEITURE.

See DEED, 1, 2.

FORGERY.

See CRIMINAL LAW, 7, 8.

FORMER ADJUDICATION.

See PLEADING, 5, 6.

FRAUD.

See ADOPTION, 1; FRAUDULENT CONVEYANCE; PARTNERSHIP; SHERIFF'S SALE, 1, 2.

1. *Conspiracy*.—*Exchange of Real Estate*.—*Rescission of Contract*.—*Fraudulent Representations*.—*Pleading*.—*Complaint*.—A complaint for the rescission of a contract for the exchange of real estate, which alleges, in substance, that W. and two others, for the purpose of defrauding plaintiff of a valuable farm, conspired together, and falsely and fraudulently represented that W. was the owner of a certain tract of good, tillable land, with valuable improvements thereon, desirably located in a certain county in another State, and worth a certain sub-

stantial sum, which he would convey to plaintiff in exchange for his farm and pay him a certain cash difference, and by falsehood and device impressed him with the desirability of the trade, without an inspection of the land; whereas such land is swamp land, wholly unimproved, situated in a different county from that represented, and almost wholly worthless, of all which plaintiff was ignorant until after an exchange of deeds, states a good cause of action.

Wolfe v. Pugh, 293

2. *Same.—Parties to Conspiracy.*—All who concur in and willingly and knowingly become parties to, and further, a conspiracy, are parties to it without proof of other or previous agreement to concur in or further it. *Ib.*
3. *Same.—Agency.*—There may be an agency, and also a conspiracy to defraud, between the same persons and relating to the same transaction. *Ib.*
4. *Same.—Principal and Agent.—Liability of Principal for Fraud of Agent.*—Where a principal authorizes an agent to effect an exchange of lands with a third person, he is answerable for and is bound by the acts and representations of the agent, and the instrumentalities employed by him in accomplishing that end, even though the agent is guilty of fraud which the principal did not direct, and of which he did not have knowledge. *Ib.*
5. *Same.—Evidence.—Rescission.*—The acts and representations of the agent in the way of inducing the third person to make the trade, and the acts and declarations of another, in the presence of the agent, who is used by him as a means of deceiving such third person, are competent evidence against the principal in an action for rescission. *Ib.*
6. *Transfer of Property by Failing Debtor.—Attachment.—Replevin.—Possession.*—Where a fraudulent transfer of personal property by a failing debtor is made the ground of attachment proceedings by creditors, and such ground is sustained, such attaching creditors are entitled to possession of such property as against the debtor and his vendee. *Seivers v. Dickover, 495*
7. *Same.—Judgment for Value.*—A judgment in favor of the attachment plaintiffs for the value of the property, in case a return can not be had, is authorized by the statute. *Ib.*
8. *Same.—Rights of Fraudulent Vendee.*—The fraudulent vendee of a failing debtor is not entitled to receive, out of the property, money paid by him in such transaction, even where it has gone to *bona fide* creditors, as the law will leave parties who have been convicted of fraud where it finds them. *Ib.*

FRAUDULENT CONVEYANCE.

See FRAUD.

1. *Answer.—Deed.—Delivery.*—An answer to a complaint to set aside a conveyance alleged to be fraudulent as to creditors, alleging that the deed was drawn up in the name of the debtor as grantee; that it was never delivered; that the grantor intended to make a gift of the land to his daughter, the wife of the debtor, and that at his daughter's solicitation he made another deed conveying the land to her, is good. *Bremmerman v. Jennings, 253*
2. *Same.—Husband and Wife.*—A husband has a right as against creditors to join in a conveyance to a trustee for his wife, in order to correct a mistake and clear up her title. *Ib.*

GARNISHMENT.

See ATTACHMENT, 1, 2.

GIFT.

See FRAUDULENT CONVEYANCE, 1.

GRAVEL ROAD.

See HIGHWAY.

1. *Bond for Preliminary Expenses.*—A board of county commissioners have no authority or power to act, or take any steps whatever, in a proceeding for the establishment and construction of a free gravel road, under the provisions of the statute (R. S. 1881, sections 5091, 5092), until a bond for the expenses of the preliminary survey shall be filed. The purpose of the statute is to relieve the county, ultimately, from the payment of the expenses incident to the proceedings, in the event that the improvement prayed for is not finally ordered by the board.
Scott v. Board, etc., 42
2. *Same.—Revocation of Order Establishing Road.—Estoppel.*—While proceedings are still pending before the board, it has authority, for good cause, to revoke an order establishing the road, and if this is done at the instance of the signers of the bond, they are estopped from denying the legality of the revocation, in a suit on the bond against them. The revocation of the order is, in effect, the same as if no such order had ever been made, and renders the signers of the bond liable on the bond for the expenses they thereby obligated themselves to pay. It is not necessary that all the petitioners unite in a request for a revocation. If any of them are aggrieved by the revocation, they have a right to appeal therefrom. Others, who did request the revocation, can not complain in their behalf, and are estopped from complaining for themselves afterwards.
Id.
3. *Taxes in Aid of.—County Commissioners.—Special Session.—Injunction.*—An order, made by a board of commissioners at a special session not legally convened, levying a special tax to aid in the construction of a gravel road, is illegal and void, and the collection thereof may be enjoined at the suit of a taxpayer.
Fahlor v. Board, etc., 167
4. *Free Turnpike.—Appeal.—Proof of Number of Petitioners.*—On an appeal to the circuit court from an order of the board of county commissioners for the making of a free turnpike, in a proceeding under section 5091, *et seq.*, R. S. 1881, the proceeding stands for trial *de novo* in the circuit court, and upon such trial the burden is on the petitioners for the improvement to prove that when said order was made by said board, the petition had been signed by the proper number of persons, as required by section 5095, R. S. 1881.
Fleming v. Hight, 466
5. *Same.—Appeal Bond.—Time of Filing.*—Such an order having been made by the board of county commissioners on the 7th of June, an appeal bond was filed and approved on the 7th of the next month.
Held, that the bond was filed within thirty days after the decision and in proper time.
Id.
6. *Free Turnpike.—Subscriptions and Donations.—Statute Construed.*—Under the provisions of section 5101, R. S. 1881, the board of commissioners of a county has power to receive subscriptions and donations in money or property, real or personal, to be applied to the construction or improvement of a free turnpike road; and such a subscription is not invalid because it is without date.
Allen v. Board, etc., 553
7. *Pleading.—Complaint.—Demurrer.*—Where such a donation, by the terms of the written subscription, is to be due and payable when the road is completed, the complaint of the county board for the collection of such donation is not bad on demurrer, because it fails to allege that the subscription was delivered by the defendants or accepted by the plaintiff, or to aver that before the commencement of the action

any demand was made on the defendants for the amount of their donation, or that they had notice of the completion of the work. *Ib.*

GUARDIAN AND WARD.

See DEDICATION, 2; DESCENT, 1.

1. *Evidence*.—Upon the trial of an action brought by a guardian to recover an amount found due his ward upon a settlement made with the defendant at a certain date, and as to which an issue has been made, it is error to reject proof of such settlement and the matters which entered into it. *Binford v. Miner, 147*
2. *Final Report*.—*Discharge*.—*Record*.—*Evidence*.—*Payment*.—A final report of a guardian showing a sum in his hands due the wards, with a prayer to be discharged, followed by an order approving the report and discharging the guardian, is no evidence that he paid the money. *Naugle v. State, ex rel., 284*
3. *Same*.—*Liability of Sureties*.—Where a guardian is discharged with money of the ward in his hands, which has never been accounted for or paid, and some years later is re-appointed, and thereafter accounts only for other moneys received during the second appointment, the sureties on the first bond are liable. *Ib.*

HARMLESS ERROR.

See BASTARDY, 1; CONTINUANCE, 2; EVIDENCE, 16; FALSE IMPRISONMENT, 3; INSTRUCTIONS TO JURY, 4; PLEADING, 17; PRACTICE, 3 to 5, 13, 27, 29.

HEIRS.

See ADOPTION; DESCENT; MARRIAGE.

HIGHWAY.

See GRAVEL ROAD; NEGLIGENCE, 2.

1. *User for Twenty Years*.—*Proceedings to Enter of Record*.—*Notice*.—Under the statute, R. S. 1881, section 5035, the board of county commissioners may cause a public highway which has been used for twenty years without being recorded, to be ascertained, described, and entered of record. No land not already in use by the public is to be taken. Yet the proceeding involves an inquiry and decision affecting the rights of the owners of property; and these must, in some manner be notified of the pendency of the proceedings. No presumption of notice will be indulged. *Yelton v. Addison, 58*
2. *Same*.—*Appeal to Circuit Court*.—*Dismissal for Want of Notice*.—Persons aggrieved by the decision of the board may appeal therefrom, under the general statute, and may move, in the circuit court, to dismiss the cause for the want of any notice of the proceeding before the board. *Ib.*
3. *Petition*.—*Amendment*.—It is within the discretion of the circuit court to permit amendments to be made to the petition in highway cases, and the Supreme Court will not interfere unless there is an abuse of discretion. *Burns v. Simmons, 557*
4. *Same*.—*Discretionary Power of Circuit Court*.—It is not an abuse of the discretionary power of the circuit court to permit an amendment to be made changing in a slight degree the line of a proposed highway, in a case where the change does not affect the interests of persons not in court. *Ib.*

HUSBAND AND WIFE.

See DESCENT; EVIDENCE, 4, 5; MARRIAGE; MARRIED WOMAN; PARTITION, 2 to 4; WITNESS, 6.

1. *Decedents' Estates*.—*Rents from Wife's Land, Husband's Liability for*.—*Trusts*.—*Acquiescence*.—Where a husband, during a long series of years, receives and applies the rents of the wife's real estate to the common

- use of the family, without objection by her, and under circumstances showing no intention on the part of either that he shall be charged therewith, she can not, after his death, maintain a claim therefor against his estate; nor can she, where such rents have been invested by the husband, with her knowledge, in other real estate, for the benefit of the family, after acquiescing in such use for a period of more than twenty years, claim him as her trustee to the extent of such investment, but she will be deemed to have waived all right to follow such rents into the property.
Bristol v. Bristol, 47
2. *Mortgage of Land Held by Entireties.—Wife's Contract of Suretyship.—Construction of Statute.*—Where land is held by husband and wife as tenants by entireties, and where, since September 19th, 1881, the date of the taking effect of section 5119, R. S. 1881, the husband and wife executed a mortgage on such land to secure the payment of an individual debt of the husband, such mortgage, as to the wife, is a contract of suretyship, which she can not enter into, and it is void both as to her and her husband.
Dodge v. Kinzy, 102
 3. *Enticing Wife Away.—Adultery.—Damages.—Evidence.—Privileged Communications.*—In an action by a husband to recover damages for enticing away, debauching, and alienating the affections of his wife, the fact as to whether adultery had been committed by the defendant and the plaintiff's wife can neither be proved nor disproved by any communications had between the plaintiff and his wife after her return.
Higham v. Vanosdol, 100
 4. *Same.—Declarations of Wife.—Res Gestæ.—Mitigation of Damages.*—In such case, declarations made by the wife to a third person, on the day she eloped with the defendant, or within the time when she was presumably under his influence, as to the causes of her leaving, which are not part of the *res gestæ* accompanying the act of leaving, and which do not impute to her husband any violence or cruel treatment, are not admissible in mitigation of damages.
Ib.
 5. *Same.—Sufficiency of Cause of Action.*—Where a stranger, knowing a woman to be the wife of another, and having no reason to suspect mistreatment of her by her husband, entices, persuades and takes her away to another State and keeps her in different places for ten days, all without the consent of her husband, such husband can maintain an action for damages without proof of adultery.
Ib.
 6. *Same.—Wife's Consent.*—In such case, it is no defence that the wife consented, or that the defendant did not otherwise persuade or entice her away, except to furnish the means and opportunity for the elopement, where he carries and keeps her away until at his pleasure she is returned, as the wife has no power to consent.
Ib.
 7. *Trust and Trustee.—Creditor's Bill.*—Where a husband receives money from his wife's mother to be invested in lands for the wife, and without her knowledge or consent takes title in his own name and holds it thirty-three years, and then, when in debt, puts the title in the wife, having, during that time, paid the taxes and by his labor cleared and improved the land, equity will not subject it to the payment of his debts.
Lord v. Bishop, 334
 8. *Desertion of Wife.—Complaint for Support.—Defect Cured by Verdict.*—A complaint by a wife against her husband to obtain provision for her support, under sections 5132 and 5133, R. S. 1881, which fails to allege that the desertion was without cause, is cured by verdict.
Harris v. Harris, 498
 9. A husband has a right as against creditors to join in a conveyance to a trustee for his wife, in order to correct a mistake and clear up her title.
Bremmerman v. Jennings, 253

INDICTMENT.

See CRIMINAL LAW, 1, 6 to 8, 10, 13 to 15.

INFANT.

See DEDICATION, 2; DESCENT; GUARDIAN AND WARD.

INJUNCTION.

See GRAVEL ROAD, 3; JUDGMENT, 6; SUPREME COURT, 6, 7.

INSANITY.

See ADOPTION, 3; MARRIAGE, 5; SHERIFF, 2.

INSTRUCTIONS TO JURY.

See BASTARDY, 1; CRIMINAL LAW, 11; EVIDENCE, 19; INTOXICATING LIQUOR, 3; JUDGMENT, 6; PRACTICE, 4, 13, 22, 28 to 31, 33; RAILROAD, 7; VERDICT, 4.

1. *Preponderance.—Practice.*—When the jury are instructed that a preponderance of the evidence is necessary to entitle the plaintiff to recover, the inference is that if the evidence is equally balanced the verdict should be for the other side, and such instruction is not erroneous because it does not expressly state such proposition.

Harper v. State, ex rel., 109

2. *Same.*—An instruction which states the law correctly as far as it purports to go is not erroneous because it might have gone further. *Ib.*

3. *Stating Elements of Offence.*—When it is undertaken to state all the elements of an offence upon the evidence before the jury, the instruction should be so constructed as not to practically withdraw from the jury competent and material evidence. *Hunter v. State, 241*

4. *Practice.—Harmless Error.*—Where there is no dispute as to the fact that work and labor was performed, and the only dispute is as to the person liable to pay for the work and labor, an omission, in an instruction enumerating the facts which the plaintiff must prove in order to entitle him to a recovery, to state that he must prove performance, is a harmless error, not warranting a reversal of the judgment.

Tomlinson v. Briles, 538

5. *Supreme Court.*—If instructions given to the jury, taken as a whole, express the law applicable to the case without material contradiction, the judgment will not be reversed because one instruction, if considered by itself, is capable of an application which would ignore a material question involved in the issues. *Blanchard v. Jones, 542*

6. *Same.—Erroneous Instructions Given on Request of Appellant.*—An appellant can not complain in the Supreme Court of an inconsistency in instructions caused by the giving of instructions, asked by himself, which present a theory different from that contained in other instructions given, which state the law correctly. *Ib.*

INSURANCE

Mortgage Clause.—Change of Ownership.—Increase of Hazard.—Commencement of Proceeding to Foreclose.—Notice.—The mere commencement of a proceeding to foreclose a mortgage, without notice to the insurer, is not of itself such a "change of ownership or increase of hazard" as will avoid a contract of insurance made for the benefit of the mortgagee, within the meaning of a stipulation in the mortgage clause of the policy for notice from such mortgagee of a change of ownership or increase of hazard.

Phoenix Ins. Co. v. Union M. L. Ins. Co., 392

INTENT.

See DEDICATION, 8 to 13.

INTEREST.

See MORTGAGE, 7; REAL ESTATE, 6.

INTERROGATORIES TO JURY.

See PRACTICE, 16, 28, 29; VERDICT, 1.

INTOXICATING LIQUOR.

See CONSTITUTIONAL LAW; CRIMINAL LAW, 17 to 19; TIME.

1. *Sale to Minor.—Evidence.*—Under section 2094, prohibiting the sale of intoxicating liquors to minors, the charge will be sustained by proof of a sale directly or indirectly. *Hunter v. State, 241*
2. *Same.—Belief as to Age of Minor.*—Where the seller believes, and has good reason to believe, at the time of the sale, that the minor is an adult, he is not guilty of the offence prescribed by the statute. *Ib.*
3. *Same.—Evidence.—Instruction.*—In such case, the defendant has a right to show such matters in defence, and the trial court has no right to assume and charge the jury that the offence is complete without regard to such evidence. *Ib.*
4. *License.*—The statute prohibiting the sale of intoxicating liquor between the hours of eleven o'clock P. M., and five o'clock A. M., is constitutional, and applies to licensed retailers of intoxicating liquors. *Hedderich v. State, 564*

JAIL.

See SHERIFF.

JUDGMENT.

See ADOPTION; APPEAL BOND; CHATTEL MORTGAGE; DIVORCE, 1, 3; EXECUTION; FRAUD, 7; JUDICIAL SALE; PARTITION, 1, 2; PLEADING, 1, 13; PRACTICE, 3, 18, 23, 26, 32; REAL ESTATE, 5; SHERIFF'S SALE; SUPREME COURT, 5; VERDICT; WILLS, 1.

1. *Bankruptcy.—Assignee's Sale of Lands.—Prior Judgment Liens.*—Where a sale is made by an assignee in bankruptcy subject to existing liens, and there are such liens antedating the filing of the petition in bankruptcy, they are not divested by the assignee's sale. A judgment creates a lien on the land of the debtor, and the lien is such that neither the adjudication in bankruptcy nor the assignee's deed will divest it. A discharge releases the bankrupt from personal liability on the judgment, but does not relieve the land from the lien. *Pauley v. Cauthorn, 51*
2. *Same.—Judgment Lien.—Enforcement of Invalid Decree.*—When a decree is without effect as against a judgment creditor, the holder of the decree can not maintain an action to enforce it, but his remedy is to bring suit to foreclose the equity of redemption of the judgment creditor. *Ib.*
3. *Amendment of.—Mistake.*—In a proceeding to amend a judgment rendered nearly two years previously, in favor of various persons, from which, it is alleged, the plaintiff's name was omitted by mistake, such mistake must be clearly shown. *Brownlee v. Board, etc., 401*
4. *Same.—Evidence.—Supreme Court.—Practice.—Presumption.*—In such case evidence other than the record is admissible to show the alleged mistake; but where the trial court refuses to hear such evidence, the Supreme Court will, in its absence from the record, presume that the ruling was right. *Ib.*
5. *Jurisdiction of Subject-Matter.—Practice.*—Where the trial court has jurisdiction of the cause of action stated in one paragraph of complaint,

but not of that stated in another, and renders judgment upon both, such judgment is not void, and it will be upheld on appeal to the Supreme Court in the absence of any proper objection to the jurisdiction.

Louisville, etc., R. W. Co. v. Fox, 416

6. *Statutory Lien.—Extension of Time.*—Under section 608, R. S. 1881, the statutory lien of all final judgments, in the Supreme and circuit courts, for the recovery of money or costs, upon real estate and chattels real liable to execution, will terminate generally at the expiration of ten years after the rendition thereof; but such statutory lien may be extended beyond the period of ten years, by appeal or injunction, by death of the judgment defendant, or by agreement of the parties entered of record. Where, therefore, the only fact alleged or proved is that more than ten years have elapsed since the rendition of the judgment, there is no error in refusing to instruct the jury that such judgment is not a lien or cloud upon the title to real estate.

Kinney v. Dodge, 573

JUDICIAL CIRCUIT.

See PROSECUTING ATTORNEY.

JUDICIAL KNOWLEDGE.

See COURTS; STATUTES, 1; TIME, 1.

JUDICIAL SALE.

1. *Protection of Purchaser where Judgment is Reversed.—Statute Construed.—Ejectment.*—Section 669, R. S. 1881, protects purchasers at judicial sales by virtue of judgments afterwards reversed, but not a purchaser from one who was a successful party to a judgment in ejectment afterwards reversed.
Dunnington v. Elston, 373
2. *Same.—Appeal.—Notice.—Judgment.—Effect of Reversal.*—A party purchasing lands, relying upon a judgment in favor of his vendor in ejectment, must take notice of the right of appeal, and is, therefore, subject to the risk of such appeal and its result. *Id.*

JURISDICTION.

See COUNTY COMMISSIONERS, 1, 4; DECEDENTS' ESTATES, 3; DRAINAGE, 19; EVIDENCE, 15; GRAVEL ROAD, 4; JUDGMENT, 5; RAILROAD, 3.

Appeal.—Supreme Court.—Action Originating Before Justice of Peace.—Amount in Controversy.—Under section 632, R. S. 1881, no appeal will lie to the Supreme Court from any judgment of a circuit or superior court, in any action originating before a justice of the peace or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars, unless such action is one involving the validity of a town or city ordinance. *Bosworth v. Wayne Pike Co., 175*

JURY.

See INSTRUCTIONS TO JURY; NEW TRIAL, 4, 5; PRACTICE, 16, 28 to 30; VERDICT, 3.

JUSTICE OF THE PEACE.

See EXECUTION; JURISDICTION; RAILROAD, 3.

LANDLORD AND TENANT.

See REAL ESTATE, 4, 5.

1. *Lease.—Election of Tenant as to Longer Term.—Rescission.*—Where a tenant, who is in possession of farm premises under a lease for one year, with the privilege of three, prior to the expiration of the year notifies the lessor that he has rented another farm, and will at once vacate the premises held under such lease, and thereupon the former arrangement is mutually rescinded, such tenant thereby elects not to

- hold such premises longer than one year, and the tenancy is terminated at that time. *Barnett v. Feary*, 95
2. *Same.—Occupancy.—Notice.*—In such case, the mere occupancy of the land at and after the expiration of the year can not be deemed an election to hold it for three years, in the face of an express notification of a different election, and after the opposite party has acted upon the same by leasing the land to other parties. *Id.*
 3. *Real Estate.—Action to Recover.—Damages.—Evidence.*—Where a tenant unlawfully detains possession of farm land during the season for sowing wheat, and so prevents the owner from using it for a wheat crop, in an action by the latter for possession and damages, evidence that the land is better adapted to wheat than corn is admissible. *Id.*
 4. *Same.—Rent.*—In such case, evidence as to the rental value of the house situate upon the land, per month, during the time of the detention, is admissible. *Id.*
 5. *Same.—Proof of Value of Land.*—Proof of the value of the land, in such case, during the time of its detention, is not necessary in order to entitle the plaintiff to recover. *Id.*
 6. *Conveyance by Landlord.—Attornment.*—Where at the time of the conveyance of real estate by ordinary warranty deed, the premises are in the actual occupancy of the vendor's tenant, the deed transfers the possession without attornment, in this State; the occupant becomes the vendee's tenant, and his mere continued occupancy does not constitute a breach of any covenant in the deed. *Kellum v. Berkshire L. Ins. Co.*, 455

LARCENY.

See CRIMINAL LAW, 13.

LEASE.

See LANDLORD AND TENANT.

LEGISLATURE.

See CONSTITUTIONAL LAW; PROSECUTING ATTORNEY, 2.

LICENSE.

See INTOXICATING LIQUOR, 4; MARRIAGE, 2.

LIEN.

See DECEDENTS' ESTATES, 1; DRAINAGE; JUDGMENT; MECHANIC'S LIEN; MORTGAGE, 9, 23; PARTITION, 1; SHERIFF'S SALE; TAXES; WILLS, 1.

LIFE-ESTATE.

See WILLS, 1, 4.

LIS PENDENS.

See EVIDENCE, 18; REAL ESTATE, 4, 5.

MANDAMUS.

1. *County Commissioners.*—Mandamus will lie against the board of commissioners to compel the performance of a duty specifically imposed by law. *State, ex rel., v. Board, etc.*, 398
2. *Same.—Railroad.—Tax in Aid of.*—It is not the duty of the board of county commissioners to cause a tax levied in aid of a railroad company to be placed upon the tax duplicate, and mandamus will not lie. *Id.*

MANSLAUGHTER.

See CRIMINAL LAW, 1.

MARRIAGE.

See DEDICATION, 15; DIVORCE; FALSE IMPRISONMENT, 1, 2.

1. *Presumption.—Rights of Children.*—The presumption in favor of marriage and the legitimacy of children is one of the strongest known to the law, and in favor of a child asserting its legitimacy this presumption applies with peculiar force. *Teter v. Teter, 129*
2. *Same.—Solemnization.—Violation of Statute Requiring License.*—No ceremony or solemnization is necessary to validate a marriage, and a marriage is not rendered void by a failure to comply with a statute requiring the parties to obtain a license, though such failure may subject them to a criminal prosecution. *Ib.*
3. *Same.—Consent.—What Constitutes.*—Where there is an agreement to form a present matrimonial connection, followed by cohabitation as husband and wife, no particular form of words is essential, provided it appears that the engagement was entered into from pure motives, and that the connection was not entered into from bad motives or for the mere purpose of sexual commerce. *Ib.*
4. *Same.—Evidence.—Legitimacy of Children.*—Where a child asserts its legitimacy, and another child, in order to obtain property, asserts its own illegitimacy, it will require strong evidence to overcome the presumption of marriage, and where the evidence shows that the engagement of the parents was entered into from good motives and in the belief that there was no impediment to the marriage, and is followed by continued and open cohabitation as husband and wife after all impediments are removed, and by the execution of deeds as husband and wife, the presumption will not be overborne by the general statement that the parties were not married, but such statement will be construed to mean simply that there was no formal marriage ceremony. *Ib.*
5. *Person of Unsound Mind.—Annulment of Marriage.—Incapable Party.—Guardian.—Complaint.*—Under section 1025, R. S. 1881, when either of the parties to a marriage is incapable, from unsoundness of mind or want of understanding, of contracting such marriage, a suit for the annulment of such marriage can be maintained upon a complaint in the name only of the incapable party, and not in the name of his or her guardian. *Pence v. Aughe, 317*

MARRIED WOMAN.

See DEDICATION, 15, 16; HUSBAND AND WIFE; MARRIAGE.

Mortgage of her Real Estate to Secure Husband's Debt.—Under the statute, R. S. 1881, section 5119, a married woman can not execute a binding mortgage upon her real estate to secure her husband's debt.

Allen v. Davis, 187

MASTER COMMISSIONER.

1. *Practice.—Reference.—Exceptions to Report.*—It is not error to permit a party to file additional exceptions to the report of a master commissioner after it is returned into court. *Bremmerman v. Jennings, 253*
2. *Same.—Finding.—Effect of.*—The finding of the master commissioner does not conclude the court in cases where the evidence is properly reported. In such cases the court may disregard the master's finding and act upon the evidence reported by the master. *Ib.*

MAYOR.

See JURISDICTION.

MEASURE OF DAMAGES.

See NEGLIGENCE, 6; REAL ESTATE, 6.

MECHANIC'S LIEN.

1. *Personal Liability to Sub-Contractor.*—The person against whom, under section 5295, R. S. 1881, personal liability for a claim in favor of a sub-contractor furnishing materials for a building might be obtained through notice, and against whom the action provided for in that section could be brought, was the owner of a building for which materials were so furnished and in which they were used; and one not such an owner was not subject to be so made liable, though he were personally liable with such owner to the original contractor.

Crawford v. Powell, 421

2. *Same.—Several Buildings Separately Owned.*—The owner of one of two buildings for which materials were furnished by a sub-contractor could not, through such notice, be rendered personally liable for the materials furnished for the other building separately owned by another person; and where a sub-contractor furnished for two buildings so separately owned materials which were used in said buildings, no distinction between the buildings being made in the furnishing of the materials or in the sub-contractor's claim therefor or his notice, no personal liability under said statute for such claim, or any part thereof, could be enforced by notice to and suit against one of such separate owners alone.

Ib.

MERGER.

See SHERIFF'S SALE, 6.

MINOR.

See INTOXICATING LIQUOR, 1 to 3.

MISTAKE.

See ASSIGNMENT OF ERROR, 3; HUSBAND AND WIFE, 9; JUDGMENT, 3, 4.

MORTGAGE.

See CHATTEL MORTGAGE; DRAINAGE, 17; HUSBAND AND WIFE, 2; INSURANCE; MARRIED WOMAN; PARTITION, 1; SCHOOL FUND.

1. *Foreclosure.—Parties.—Title.*—Parties claiming an interest in mortgaged land are proper parties defendants in an action to foreclose, and, when made parties, they are bound to set up their title or claim.
Stockwell v. State, ex rel., 1
2. *Complaint to Foreclose.—Subsequent Purchaser.—Record.—Time.*—Generally, a complaint to foreclose a mortgage against a subsequent purchaser from the mortgagor must allege that the mortgage was recorded at the place and time prescribed by the statute. *Ib.*
3. *Same.—Notice.—Privity.*—The registry of a deed or mortgage is notice only to those who claim through or under the grantor or mortgagor. *Ib.*
4. *Same.—School Fund Mortgage.*—Parties, holding or claiming through or under the mortgagor in a school fund mortgage, are bound to take notice of the mortgage, although not recorded as required by the general registry laws. *Ib.*
5. *Same.—Description.—Presumption.—Acknowledgment.*—It appearing upon the face of a mortgage and the certificate of acknowledgment, that the mortgage was executed in this State, between residents thereof, the presumption, in the absence of anything in the instrument to the contrary, is, that the description was intended for lands in this State. *Ib.*
6. *Same.—Auditor.—Loan by, to Self.*—A school fund mortgage is not void as to the State because the county auditor has made the loan to himself. *Ib.*
7. *Same.—Interest.*—Such mortgage draws the same interest after as before maturity. *Ib.*

8. *Same.—Sale without Appraisalment.*—Upon the foreclosure of a school fund mortgage, the court may order the land sold without appraisalment. *Ib.*
9. *Same.—Priority of Lien.—Taxes.*—A sale of land for taxes which accrued after the execution of a school fund mortgage, is subject to the mortgage lien. *Ib.*
10. *Same.—Entry of Satisfaction.—Recorder.—Auditor.*—The county recorder can enter satisfaction of a school fund mortgage before foreclosure, only upon an endorsement by the county auditor that the same has been fully paid. *Ib.*
11. *Same.—Clerk.—School Fund.—Foreclosure.—Evidence.*—For the purpose of showing that the law was complied with in making a loan of the school fund, the certificate by the clerk and recorder, and the affidavit of the mortgagor, required by the statute, are competent evidence, and, being competent for this purpose, a general objection to such evidence is properly overruled. *Ib.*
12. *Same.—Title of Mortgagor.—Presumption of Ownership.*—A mortgagor is presumed to be, at the time, the owner of the land mortgaged, until something to the contrary appears. *Ib.*
13. *Same.—Possession by Mortgagor.*—The possession of the land by the mortgagor, at the time of executing the mortgage, is *prima facie* sufficient to show that he was the owner. *Ib.*
14. *Foreclosure.—Parties.*—The general rule is that there can be no valid decree of foreclosure unless the owners of the mortgaged property are parties to the foreclosure suit. The remedy of the mortgagee or his assignee is to foreclose the equity of redemption of all who are interested in the land as lien-holders or owners. *Pauley v. Cauthorn, 91*
15. *Indemnity.—Foreclosure.—Breach of Condition.—Pleading.—Complaint.*—A complaint to foreclose a mortgage to indemnify a surety, containing an agreement to pay the debt and to keep the surety unharmed as such, which assigns for breach a failure to so pay and save the plaintiff unharmed, and averring that the plaintiff was compelled to and did pay, is good without alleging a failure to repay the plaintiff. *Catterlin v. Armstrong, 258*
16. *Same.—Foreclosure.—Ownership of Mortgaged Property.—Parties.—Bankruptcy.—Answer in Bar.*—An answer in bar to a complaint to foreclose a mortgage, that some of the lands were not owned by the defendant, but were and are the property of M. who is not a defendant, is bad on demurrer; so, also, an answer that the mortgagor had been adjudged a bankrupt and discharged after the cause of action accrued. *Ib.*
17. *Same.—Statute of Limitations.*—A suit to foreclose a mortgage is not barred by the statute of limitations until the lapse of twenty years. *Ib.*
18. *Same.—Junior Mortgagee.—Improvements.*—Where a senior mortgage has been foreclosed without making the junior mortgagee a party, and the land sold under the decree, the junior mortgagee whose mortgage was recorded is not bound to redeem, or offer to do so, but may sue the purchaser to foreclose, and in such case the purchaser can not claim for improvements or taxes paid. *Ib.*
19. *Same.—Marshalling Securities.*—In such case, if the rights of the defendant would require that the securities be marshalled, the complaint being silent as to any facts requiring it, the defendant should by counter-claim allege such facts and pray relief. *Ib.*
20. *Foreclosure.—Description.—Extrinsic Facts.*—Where insufficiency of the description of land in a mortgage may be aided, and foreclosure may be authorized, without reformation, by showing extrinsic facts, such extrinsic matter must be such as does not contradict the mortgage

or produce a description of other property than that described therein. It must merely explain the description in the mortgage, and point out the property by the means of identification indicated in the mortgage. *Hannon v. Hilliard*, 310

21. *Same.—Construction of Description of Premises.*—The part of a deed which describes the premises conveyed or mortgaged should be liberally construed, with a view to make the deed available. *Ib.*
22. *Same.—Complaint.—Single Cause of Action.*—A mortgage is a single cause of action, and in a complaint to foreclose it, however many notes or instalments it secures, a single paragraph only is necessary. *Ib.*
23. *Descents.—Widow.*—The mortgage of a widow on lands acquired from her deceased husband will convey a lien on her interest therein. *Clark v. Deutsch*, 491

MUNICIPAL CORPORATION.

See TAXES.

NEGLIGENCE.

See RAILROAD, 5 to 7; VERDICT, 3.

1. *Defective Bridges.—County Commissioners.—Damages.*—Under section 2892, R. S. 1881, it is the duty of the board of commissioners of a county in this State to cause all bridges over which it has control to be kept in repair, and if it negligently suffers such a bridge to remain out of repair, and a person, in the ordinary use of the same, is injured in person or property, without any fault of his own, he can maintain an action for damages against such board. *Vaughl v. Board*, etc., 123
2. *Same.—Bridges Built and Maintained by Township.—Highway.*—Where a bridge, located upon and constituting a part of a public highway, has been built and maintained by township authorities, it is still the duty of the board of commissioners to see that it is kept in repair, and for failing in this duty it is liable, although it has never accepted, recognized, or in any way adopted the same as a county bridge. *Ib.*
3. *Contributory Negligence.—Burden of Proof.*—Where a plaintiff sues to recover for an injury to his property occasioned by the negligence of another, the burden is on him to show that his own negligence did not contribute to the injury. *Lyons v. Terre Haute*, etc., R. R. Co., 419
4. *Same.—Railroads.—Killing Cattle.*—Where there is no order of the board of county commissioners allowing stock to run at large, the owner can not recover from a railroad company for cattle killed upon a public crossing. *Ib.*
5. *Same.—Matter of Law.*—Where there is no evidence from which it can be inferred that there was an order of the board of commissioners allowing stock to run at large, the court may, as matter of law, conclusively infer negligence. *Ib.*
6. *Measure of Damages.—Moral Character.*—In an action for damages for injury to the person through negligence, the moral character of the plaintiff is not relevant as an element in the measure of damages. *Indianapolis*, etc., R. W. Co. v. *Bush*, 582

NEW TRIAL.

See DEMURRER TO EVIDENCE, 4; PRACTICE, 20; SPECIAL FINDING, 1, 3; VERDICT, 2.

1. *Newly Discovered Evidence.—Bastardy.—Impeaching Evidence.—Admissions of Party.—Practice.*—Statements of the mother of a bastard child, some time after its birth, as to the identity of its father, can be used as impeaching evidence only in a bastardy proceeding, and not as an admission by a party to the action, and, therefore, will not, as a gen-

eral rule, as newly discovered evidence, constitute cause for a new trial.
Harper v. State, ex rel., 109

2. *Same.—Cumulative Evidence.*—A new trial will not be granted upon the ground of newly discovered evidence, when such evidence is merely cumulative *Ib.*
3. *Same.—Affidavits.—Practice.—Supreme Court.*—When newly discovered evidence is relied upon as a cause for a new trial, the affidavits supporting it must appear in the record in order to present any question in relation thereto in the Supreme Court. *Ib.*
4. *Same.—Misconduct of Jurors.—Presumption.*—In the absence from the record of affidavits or other evidence tending to establish misconduct on the part of jurors, which is alleged as cause for a new trial, the Supreme Court will presume that the trial court did right in disregarding the same. *Ib.*
5. *Same.—Want of Certainty.*—Where jurors, against whom misconduct is charged as a cause for a new trial, are not named or otherwise particularly identified, the charge is too indefinite. *Ib.*
6. *Newly Discovered Evidence.*—One who seeks a new trial on the ground of newly discovered evidence must rebut all presumptions against him, and where a witness is subpoenaed but fails to attend, it is the duty of the party to show that he took steps to secure his attendance by compulsory process. *Marks v. State, ex rel., 353*
7. *Excessive Damages.—Practice.*—Where a judgment is too large, a new trial should be asked on the ground of excessive damages.
Louisville, etc., R. W. Co. v. Fox, 416

NOTICE.

See APPEAL BOND, 4; CONTRACT, 1, 4, 9; DESCENT, 1; DIVORCE; DRAINAGE, 17; GRAVEL ROAD, 7; HIGHWAY, 1, 2; INSURANCE; JUDICIAL SALE, 2; LANDLORD AND TENANT, 2; MECHANIC'S LIEN; MORTGAGE, 3, 4; PARTNERSHIP; REAL ESTATE, 4, 5; SCHOOL FUND.

Name.—Signs.—A father, who had been in business for a number of years, sold out to his son, who continued the business; no change was made in the names or signs about the place of business, and the son bought goods of the appellants, who had formerly dealt with his father, but the sellers had notice that the father had retired, and that the son had succeeded him.

Held, that the father was not liable for the goods sold to the son.

Gathright v. Burke, 590

OFFICE AND OFFICER.

See CONSTABLE; COUNTY CLERK; ELECTION; SHERIFF.

Gratuitous Service.—Where official duties, to which no compensation is attached, are imposed upon a public officer, they must be performed gratuitously.
Board, etc., v. Gresham, 53

PARTIES.

See ATTACHMENT, 3; FRAUD, 2; MORTGAGE, 1, 14, 16; PLEADING, 3; PRACTICE, 6; STATUTE OF FRAUDS, 2; SUPREME COURT, 2.

PARTITION.

See DEDICATION, 1, 2, 15; DESCENT, 2.

1. *Mortgage Lien.—Judgment.*—Where partition is made of land upon which there is a purchase-money mortgage, the parties take their respective interests subject to it, without any declaration in the judgment to that effect.
Quick v. Brenner, 230
2. *Same.—Widow.—Interest in Land Alienated by Husband.—Improvements by Alienee.*—In a proceeding by a widow to have her interest in land,

alienated by her husband alone, set apart to her, such interest is to be determined by the value of the land at the time of partition, excluding all the increased value from the improvements actually made by the alienee, and leaving the widow the benefit of any increase of value arising from circumstances unconnected with such improvements. *Id.*

3. *Same.—Exception to Confirmation of Report of Commissioners.—Practice.*—A mere exception to the confirmation of the report of commissioners in partition presents no question as to their duty in making allowance for improvements. *Id.*
4. *Descents.—Husband and Wife.—Abandonment.*—To a petition by a surviving husband for partition of lands of which the wife died seized, an answer that before and at her death he had abandoned her without cause, making no provision for her support, is good on demurrer under section 2448, R. S. 1881. *Hinton v. Whittaker, 344*
5. *Possession.—Statute of Frauds.*—In this State a parol partition of real estate, consummated by possession, is binding; and an agreement for partition of lands is not within the statute of frauds. *Savage v. Lee, 514*
6. *Same.—All Cotenants Must be Affected.*—There can not be said to be a voluntary partition, or an agreement therefor, unless by the agreement of all the cotenants of the property, there is, or there is to be, a severance of the interest of one or more of the cotenants in at least some part of such property. No arrangement between tenants in common can result in a partition, unless it operate upon and affect the interests of all the tenants in some part of the common estate. *Id.*
7. *Same.—Agreement between Part of Cotenants.*—Where certain real estate was owned by four persons as tenants in common, and there was a transaction between three of them, such that, if they had been the only tenants, there would have been a partition, or an agreement for a partition, of the whole common estate between such three, a certain portion to one in severalty, and the remainder to the other two jointly, the fourth tenant still holding his interest in both such tracts, *Held*, that this could not be regarded either as a partition or an agreement therefor. *Id.*

PARTNERSHIP.

See ATTACHMENT, 3; NOTICE.

Conveyance of Partnership Property.—Fraud.—Bona Fide Purchaser.—Notice.—Where partners convey all the partnership property in payment of the individual debts of the partners, and it is afterwards conveyed to one who takes in good faith for value, without notice of any fraudulent intent, the property can not be subjected to the payment of partnership debts. *Jewell v. Meech, 289*

PAYMENT.

See CHATTEL MORTGAGE; DECEDENTS' ESTATES, 1 to 3; GUARDIAN AND WARD, 2; PRINCIPAL AND SURETY.

PERSONAL PROPERTY.

See FRAUD, 6 to 8; JUDGMENT, 6.

PLEADING.

See ADOPTION, 1; ASSIGNMENT FOR BENEFIT OF CREDITORS; ASSIGNMENT OF ERROR, 1; ATTACHMENT, 3; CONTRACT, 4, 5, 9; COUNTY COMMISSIONERS, 5; DEED, 2, 6; DEMURRER TO EVIDENCE, 5; DRAINAGE; FALSE IMPRISONMENT; FRAUD, 1; FRAUDULENT CONVEYANCE, 1; GRAVEL ROAD, 7; HIGHWAY, 3, 4; HUSBAND AND WIFE, 8; JUDGMENT, 3, 5; MARRIAGE, 5; MORTGAGE, 2, 15, 16, 22; PARTITION, 4; PRACTICE, 1, 5, 10, 14, 17 to 19, 23, 24, 30; RAILROAD, 2; SUPREME COURT, 7.

1. *Practice.—Motion in Arrest.—Supreme Court.*—A complaint, to which no demurrer has been filed, will not be held bad on a motion in arrest, or on assignment in the Supreme Court that it does not state sufficient facts, simply because of containing statements of conclusions.
Stockwell v. State, ex rel., 1
2. *Construction.*—In construing a pleading with reference to an allegation of fact, all its averments relating thereto will be considered.
Barnett v. Feary, 95
3. *Real Party in Interest.*—In order to present the question that the plaintiff is not the real party in interest, it must be specially pleaded.
Mathis v. Thomas, 119
4. *Complaint.—Demurrer.—Motion to Make Certain.—Practice.*—Where the facts alleged in a complaint constitute a substantially good cause of action against the defendant, it is sufficient on demurrer and on motion to make more certain, although it might, with propriety, have been ordered to be made more certain. *Alleman v. Wheeler, 141*
5. *Former Adjudication.—Practice.—Uncertainty.*—In pleading a former adjudication, it is material to set out with certainty the date on which the judgment was given and the court in which it was rendered; but if the date is left blank, or is otherwise uncertain, the remedy is by motion to make the pleading more specific, and not by demurrer.
Ludlow v. Marion, etc., G. R. Co., 176
6. *Same.—Identity of Causes of Action.*—Where an answer of former adjudication, taking it as a whole and considering its scope, shows that the matter in controversy in the former and present actions is the same, it is in that respect sufficient on demurrer. *Ib.*
7. *Complaint.—Plaintiffs.*—A complaint must be sufficient as to all the plaintiffs, or it is not sufficient as to any. *Brumfield v. Drock, 190*
8. *Written Instrument.—Copy.—Demurrer.*—When a pleading is founded on a written instrument, under section 362, R. S. 1881, the original instrument or a copy thereof must be filed with such pleading, or it will be held bad on a demurrer thereto for the want of sufficient facts.
Landon v. White, 249
9. *Practice.*—A plaintiff must recover upon the theory of the case on which his complaint proceeds or he can not recover at all.
Bremmerman v. Jennings, 253
10. *Reference to Another Paragraph.—Supreme Court.*—Where, in the Supreme Court, no question is made upon the pleadings, and the question to be decided in that court relates to the sufficiency of the evidence, the insufficiency of a paragraph of pleading, because of its reference to and adoption of part of the allegations of another paragraph, will not avail the appellant.
Hannon v. Hulliard, 310
11. *Demurrer.—Incapacity to Sue.*—A demurrer to a complaint for the second statutory cause, "that the plaintiff has not legal capacity to sue," has reference only to some legal disability of the plaintiff, such as infancy or idiocy, and not to the fact that the complaint fails to show a right of action in such plaintiff.
Pence v. Aughe, 317
12. *Same.—Want of Facts.—Cause of Action in Plaintiff.*—A demurrer to the complaint for the fifth statutory cause (section 339, R. S. 1881) calls in question not only the sufficiency of the facts stated in the complaint to constitute a cause of action, but the right of the plaintiff to maintain the action. *Ib.*
13. *Practice.—Arrest of Judgment.*—Where, by intendment, a necessary fact not averred may be supplied, a complaint will be held good on motion in arrest of judgment. *Louisville, etc., R. W. Co. v. Hizon, 337*
14. The object of pleading is to bring the parties to an issue on the pre-

- cise matters in dispute, by a presentation of the grounds of claim on the one side, and of defence on the other. *Potts v. Hartman*, 359
15. *Same.—Complaint.—Modified Contract.*—Where suit is brought on a contract which has been modified, the complaint must be based on the contract as modified, and if defective in this respect, it can not be cured by the averments of a reply to an answer. *Ib.*
 16. *Same.—Contract in Parts.—Exhibits.*—Where an action is on a contract in writing, consisting of separate parts, all the parts or copies of all must be filed with the complaint. *Ib.*
 17. *Same.—Harmless Error.*—Where a complaint is essentially defective, the plaintiff can not be heard to complain that a demurrer to an answer to it has been erroneously overruled, for he is not substantially injured by such an error. *Ib.*
 18. *Written Instrument.—Reference to Copy of Instrument.*—A pleading containing the statement, "The said note is in the words and figures following, to wit (here insert 'Exhibit A,' which is filed herewith and made a part hereof,)" refers with reasonable certainty to the copy of the note filed with the pleading. *Dunkle v. Nichols*, 473
 19. *Parol Promise.—Cause of Action.—Sufficiency of Complaint.—Demurrer.*—In declaring upon a parol promise to pay or repay money upon the happening of a certain event, the complaint is bad upon demurrer for the want of sufficient facts, unless it be averred therein that such event has happened, as it will fail to state an existing cause of action. *Wheeler v. Hawkins*, 486
 20. *Same.—Consideration.*—So, also, in declaring upon such parol promise, the complaint is insufficient on demurrer, if it fail to show that the promise sued on is supported by a sufficient legal consideration. *Ib.*
 21. *Stating Cause of Action in Different Forms.*—A cause of action may be stated in different forms, and unless it clearly appears that the cause of action stated in the several paragraphs is one and the same, requiring the same evidence and no more, it is material error to sustain a demurrer to one of the paragraphs if it is good in itself. *Carviness v. Rushton*, 500
 22. *Demurrer to Reply.—Surplusage.*—A demurrer to a reply, in substantial compliance with the provisions of section 357, R. S. 1881, is sufficient both in form and substance, and is not rendered defective by the introduction of other matter, which may be properly regarded as surplusage. *Miller v. White River School Tp.*, 503
 23. *Sufficiency of Complaint.—Mistake of Law.*—As a general rule, the courts will afford no relief against mistakes of law; but where the complaint shows that the defendant is an attorney at law, skilled and learned in the law, and that the plaintiff's mistake of law was induced by the misrepresentations of the defendant, and was known to and taken advantage of by him, such complaint states a cause of action, good even on demurrer, and good, beyond doubt, when questioned for the first time, in the Supreme Court. *Kinney v. Dodge*, 513
 24. *Same.—Special Answer.—Confession and Avoidance.—Argumentative Denial.—Issue.*—Where a special or affirmative answer does not confess and avoid the plaintiff's cause of action, but alleges facts which, if true, are utterly inconsistent with the truth of material facts averred in the complaint, such answer is an argumentative denial of such material averments of the complaint, and puts them in issue, and the burden of such issue is on the plaintiff. *Ib.*
 25. *Argumentative Denial.*—It is not error to overrule a demurrer to an answer pleading an argumentative denial. *Sohn v. Jervis*, 578

PRACTICE.

See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CONTINUANCE; COUNTY COMMISSIONERS, 2, 4; CRIMINAL LAW, 6, 9 to 11, 14 to 16; DEMURRER TO EVIDENCE; DRAINAGE; EVIDENCE, 2, 6, 8, 9, 14 to 16, 20 to 22; GRAVEL ROAD, 4, 5; HIGHWAY, 2 to 4; HUSBAND AND WIFE, 8; INSTRUCTIONS TO JURY; JUDGMENT, 2 to 6; MASTER COMMISSIONER; NEW TRIAL; PARTITION, 3; PLEADING, 1 to 5, 9, 13, 25; SPECIAL FINDING; SUPREME COURT; VERDICT; WITNESS.

1. *Appeal.—Record.—Motion to Strike Out Pleadings in Trial Court.*—Where a motion to strike out part of a paragraph of complaint is sustained, such motion must be made a part of the record by bill of exceptions or order of court, in order to be available in the Supreme Court on appeal. *Scott v. Board, etc., 42*
2. *Burden of Proof.—Special Finding.*—A party who has the burden of proof can not recover unless all the facts essential to a recovery appear in the special finding. *Krug v. Davis, 75*
3. *Judgment Correcting Error in Special Finding.—Harmless Error.*—Where an error in a special finding is corrected by the final judgment, the error is rendered harmless. *Ib.*
4. *Instructions.*—There is no available error in a refusal to give an instruction to the jury which is predicated upon a fact which their answers to interrogatories show does not exist. *Barnett v. Feary, 95*
5. *Pleading.—Harmless Error.*—An error in overruling a demurrer to one paragraph of complaint will not reverse the judgment where it affirmatively appears that the finding was upon another paragraph. *Ib.*
6. *Parties.—Assignment of Cause of Action after Suit.*—Where the cause of action is assigned after the action is instituted, the action may be prosecuted in the name of the assignor. *Mathis v. Thomas, 119*
7. *Presumption.—Trial Court.*—All presumptions are in favor of the action of the trial court, and an error, in order to reverse a judgment, must affirmatively appear in the record. *Binford v. Miner, 147*
8. *Exclusion of Testimony.—How Question Reserved.*—The exclusion of testimony can only be made available by asking some pertinent question of a witness on the stand, and, if objection is made, stating to the court what testimony the witness would give in answer thereto. *Higham v. Vanosdol, 160*
9. *Special Finding.—Conclusions of Law.*—Conclusions of law erroneously cast into the finding of facts do not control, for the court acts upon the facts found. *City of Indianapolis v. Kingsbury, 200*
10. *Motion by Defendant to Compel Plaintiff to Enlarge Prayer for Relief.*—A motion by a sole defendant, after issues are formed, to compel the plaintiff to enlarge his prayer for relief, comes too late, and is unwarranted at any time. *Catterlin v. Armstrong, 258*
11. *Objection to Evidence Before it is Given.*—It is not error for the trial court to overrule an objection to the testimony of a witness made before such testimony is given, and when the court can not know what it will be. *Wolfe v. Pugh, 293*
12. *Same.—Motion to Strike Out.*—It is not error to overrule a motion to strike out certain evidence as a whole, where a part is competent. *Ib.*
13. *Same.—Harmless Error.*—If a judgment is right upon the evidence, it will not be reversed because of erroneous instructions. *Ib.*
14. *Demurrer.—Failure to Plead Over.*—If a party fails to plead over after a demurrer is overruled, judgment should be entered as upon default, and the interposition of a defective answer, to which a demurrer was

- sustained, is a failure to plead over, and the case should proceed as though no answer had been interposed. *McKinney v. State, etc.*, 355
15. *Bill of Exceptions.*—Where it affirmatively appears in the body of a bill of exceptions that evidence was given on the trial which is not contained in the bill, the general recital that "this was all the evidence given in the cause" will not control. *Jennings v. Durham*, 391
 16. *Same.—Equity Cases.—Effect of Answers of Jury to Interrogatories.*—The court is not bound by the answers of the jury to interrogatories submitted to them in cases of equitable cognizance. *Ib.*
 17. *Discretion of Court.—Withdrawal of Pleading.*—It is within the discretion of the trial court to permit a plea in bar to be withdrawn and a plea in abatement to be filed. *D. S. Morgan & Co. v. White*, 413
 18. *Motion in Arrest of Judgment.—Pleading.*—A single paragraph of a complaint consisting of more than one can not be assailed by a motion in arrest of judgment. *Louisville, etc., R. W. Co. v. Fox*, 416
 19. *Joint Demurrer.*—A joint demurrer to a pleading consisting of two or more paragraphs should be overruled if any of such paragraphs be good. *Crawford v. Powell*, 421
 20. *Special Finding.—Motion for New Trial.*—In considering an exception to the conclusion of law in a special finding, the Supreme Court treats the statement of facts in the finding as containing all the material facts shown by the evidence. The failure of the court to state all such facts may be reached by motion for a new trial, assigning that the finding is not sustained by sufficient evidence. *Ib.*
 21. *Argument of Counsel.—Allusion to Absence of Defendant in Civil Action.*—An allusion of counsel, during the closing argument to the jury in a civil cause, to the absence of the defendant, is not available for the reversal of the judgment, when it does not appear that he was harmed thereby. *Carter v. Carter*, 451
 22. *Same.—Statement as to Change of Venue.*—A statement in the closing argument to the jury, that the opposite party had taken a change of venue, is not proper, but if the counsel at once desist upon objection being made, and the court tells the jury that the change of venue had nothing to do with the case, and they should not consider it, there is no available error. *Ib.*
 23. *Judgment on Pleadings.—Rule to Answer.*—Where the parties by agreement submit a cause to the court for trial, a plaintiff who has not asked and obtained a rule to answer can not, after a finding by the court, successfully move for a judgment on the pleadings. *Hartlep v. Cole*, 458
 24. *Right of Trial Court to Change Ruling on Demurrer.*—A trial court may change a ruling on demurrer before trial, and the plaintiff can not complain of the action of the court in setting aside a ruling against him on a demurrer to the complaint and entering one in his favor. *Ib.*
 25. *Dismissal of Action.—Joint Motion.—Error.*—Where two or more defendants jointly move the court to dismiss the plaintiff's action, it is error to sustain such motion and dismiss the action, where any one or more of such defendants are not entitled to such dismissal. *State, ex rel., v. Cunningham*, 461
 26. *Using Bill of Exceptions on Former Trial as Evidence.—Motion for Judgment.*—Where, upon a trial of issues of fact, the evidence consisted of a bill of exceptions containing the evidence introduced on a former trial of such issues, together with a written agreement as to additional facts, and the finding was for the defendant.
- Held*, that a motion would not lie for judgment for the plaintiff, upon the

ground that the evidence was written and sustained the complaint, and that no defence was proved. *Robertson v. Huffman*, 474

27. *General and Special Finding.*—Where there is one entry, and the whole finding is therein set forth, there is no substantial error in prefacing the special finding by a general finding. *Clark v. Deutsch*, 491
28. *Interrogatories to Jury.*—*General Verdict.*—*Duty of Court.*—Ordinarily, it is the duty of the trial court, when requested by either party, to instruct the jury, if they render a general verdict, to find specially upon particular questions of fact, in answer to written interrogatories within the scope of the issues, and it is error to refuse such an instruction, or to submit to the jury such interrogatories. *Miller v. White River School Tp.*, 503
29. *Same.*—*Directing Verdict.*—*Harmless Error.*—Where the court, in the discharge of its duty, and without invading the province of the jury, may properly instruct them to return their verdict for either party, the error of the court in refusing to submit interrogatories to the jury, at the request of the other party, is at most a harmless error. *Ib.*
30. *Same.*—*Immaterial Issue.*—Where the complaint states a good cause of action, and issue is joined upon a special or affirmative paragraph of answer, which states no defence whatever to plaintiff's action, and where the allegations of such paragraph of answer are admitted to be true on the trial, it is error for the court to instruct the jury, upon such immaterial issue, to return a verdict for the defendant. *Ib.*
31. *Instructions.*—*Repeating.*—Where the jury is once fully and clearly instructed upon a given point, the court is not bound to repeat the instructions in different language. *Chicago, etc., R. R. Co. v. Boggs*, 522
32. *Burden of Issue.*—*Open and Close.*—*Error.*—On the trial the party on whom rests the burden of the issue has the right to open and close the case to the jury, and the refusal of such right is an available error for the reversal of the judgment. *Kinney v. Dodge*, 573
33. *Withdrawal of Erroneous Evidence.*—If before the close of the argument to the jury the court withdraw evidence erroneously admitted, and admonish the jury not to consider it, the error of its admission will be cured. *Indianapolis, etc., R. W. Co. v. Bush*, 582
34. *Motions and Affidavits.*—*Bill of Exceptions.*—*Record.*—*Appeal.*—On appeal to the Supreme Court, motions and affidavits constitute no part of the record, unless they are made so either by a bill of exceptions or by an order of the trial court; and where it is attempted to make motions or affidavits a part of the record by bill of exceptions, they must be set out at length in such bill or be referred to therein as properly appearing elsewhere in the record. *Shields v. McMahan*, 591

PRESUMPTION.

See BOARD OF HEALTH, 3; DEDICATION, 7, 9, 12, 13, 16; DRAINAGE, 7, 12; HIGHWAY, 1; JUDGMENT, 4; MARRIAGE, 1, 4; MORTGAGE, 5, 12; NEW TRIAL, 4; PRACTICE, 7; REAL ESTATE, ACTION TO RECOVER, 3; SHERIFF, 2; SHERIFF'S SALE, 1; SPECIAL FINDING, 4; SUPREME COURT, 4.

PRINCIPAL AND AGENT.

See CONTRACT, 8; FRAUD, 3 to 5.

Real Estate Agent Bound to Disclose Offers.—*Principal Entitled to Price, Agent to Commission Only.*—An owner of real estate appointed an agent to sell it at not less than a certain price, agreeing that if during a certain period the agent would furnish a buyer at such price, he should be paid by said owner a certain per cent. commission on the amount for which the property should be sold. The agent sold for a better price. In a suit by the principal against the agent, to recover a por-

tion of the price retained by the agent in addition to such commission,
Held, that if said agent, acting under such appointment, received a more advantageous offer than he was so authorized to accept, it was his duty to communicate the offer so received to his principal, and not to purposely conceal it from him; and that if, so acting as agent, he effected a better trade than he was so authorized to make, said owner was entitled to the benefit of the trade, and was bound to the agent only for his commission, and not for any surplus of the price received above the amount which the agent was so authorized to accept. *Blanchard v. Jones, 54.*

PRINCIPAL AND SURETY.

See APPEAL BOND; GUARDIAN AND WARD, 3; HUSBAND AND WIFE, 2; PROMISSORY NOTE, 2.

1. *Release.—Collateral Security.*—Where a creditor has notice of the relation of principal and surety, he holds collateral securities in trust for the benefit of the surety, and the release of such securities releases the surety to the extent of the whole value thereof. *Crim v. Fleming, 154*
2. *Same.—Assignment of Fees Due Debtor.—Surrender.*—Where a creditor receives an assignment of fees due the debtor as a public officer, and agrees to collect them and apply the proceeds to the payment of his claim, and, without the consent of the surety, he allows the debtor to collect and appropriate the proceeds, the surety is proportionally released. *16.*
3. *Same.—Diligence of Creditor.*—Upon a failure of the creditor to use reasonable diligence to make collateral securities available, he is responsible to the surety for consequent loss, and without notice from the surety. And this does not violate the rule that mere passive negligence will not release the surety from obligation to pay on default. *16.*
4. *Same.—Indemnifying a Surety.*—Where a principal pays to the surety sufficient money to indemnify him, the surety holds the money for the benefit of the creditor, to whom he occupies the position of a debtor. *16.*

PRIVILEGED COMMUNICATIONS.

See HUSBAND AND WIFE, 3, 4.

PROMISE.

See CONTRACT, 10.

PROMISSORY NOTE.

See PLEADING, 18.

1. *Endorsement.—Warranty of Title and Genuineness.—Estoppel.*—One who transfers a negotiable instrument by endorsement, warrants the title and genuineness of the paper, and, when sued upon his contract of endorsement, he is estopped from denying the existence, legality or validity of the contract which he transfers, for the purpose of defeating his own liability thereon. *Alleman v. Wheeler, 141*
2. *Same.—Alteration.—Principal and Surety.—Sufficiency of Evidence.*—A. W. and E. W. were private bankers, and as such loaned to D. certain money for which he executed his note to E. W., cashier, with K. and A. and another as sureties. At its maturity the note was renewed with K. and A. only as sureties. When it was about due again, D. procured A. W. to prepare a new note in further renewal, payable to the latter. D. and K. signed this note, and D. then returned it to A. W., at his bank, and told A. he would find it there awaiting his signature. A. went to the bank, but told A. W. that he was unwilling to longer continue as co-surety with K., but was willing to endorse the note as surety for both D. and K. A. W. thereupon explained how that could be done, and acting under the impression that

A. wished and was authorized to have the change made, drew his pen across the name "A. W." and wrote A.'s above it, and the latter then wrote his name across the back. When the note became due E. W. brought suit thereon against D. and K., who denied the execution of the note and succeeded in their defence. In a subsequent action by A. W. against A. on his endorsement, there was a finding and judgment against the latter.

Held, that upon the above evidence the finding will not be disturbed. *Ib.*

3. *Demand*.—It is not necessary to aver or prove a demand for payment of a promissory note, designating the time of payment thus: "On or before December 25th, 1881, after date, I promise to pay to the order of Mary Nichols five hundred and twenty-five dollars."

Dunkle v. Nichols, 473

4. An instrument reading thus: "I promise Emily Caviness to give her two thousand dollars at my death to take care of her children with, which she claims of my estate. She has been in my family nineteen years and a faithful servant, and it is my will to her," is not a promissory note.

Caviness v. Rushton, 500

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 5.

1. *Residence*.—*Judicial Circuit*.—*Constitutional Law*.—Under sections 9 and 11 of article 7 of the Constitution of this State of 1851, the prosecuting attorney, like the judge of each judicial circuit, is required to reside within his circuit. *State, ex rel., v. Johnston, 223*
2. *Same*.—*Judicial Circuits*.—*Legislative Power and Discretion*.—*Constitutional Restriction*.—The General Assembly has the power, in its discretion, to divide a judicial circuit at any time during the terms of office of the judge and prosecuting attorney of such circuit, subject only to the restrictions that the Legislature can not, by any legislation, abridge the official terms of either of such officers, nor deprive either of them of a judicial circuit, wherein he may serve out the constitutional term for which he was elected. Section 5 of the act of February 25th, 1885 (Acts 1885, p. 29), in so far as it relates to the office of prosecuting attorney, is unconstitutional and void. *Ib.*

PUBLIC POLICY.

See DIVORCE, 2.

PUBLICATION.

See DIVORCE, 1.

QUIETING TITLE.

See EVIDENCE, 12.

QUO WARRANTO.

See ELECTION, 2, 3.

RAILROAD.

See CONTRACT, 7; MANDAMUS; NEGLIGENCE, 3 to 6.

1. *Township Tax in Aid of Construction*.—*Suspension of Collection*.—*Power of County Board*.—*Auditor and Treasurer*.—Where a township tax to aid in the construction of a railroad has been duly levied and placed upon the tax duplicate for collection, the board of commissioners of the county has no power, under section 4069, R. S. 1881, or any other statute of this State, to make an order directing the county auditor and treasurer to suspend the collection of such tax, and such order, if made, is null and void for any purpose. *State, ex rel., v. Laughlin, 29*

2. *Killing Stock.—Complaint.*—"Sufficiently Fenced."—In an action under the statute, against a railroad company for killing stock, a complaint averring that the railroad track was not "sufficiently fenced" at the place where the animals got on the track and were injured and killed, sufficiently alleges that the track was not "securely fenced," as required by the statute, and is good on demurrer.
Evansville, etc., R. R. Co. v. Tipton, 197
3. *Animals Killed.—Jurisdiction of Justice of Peace.*—Where animals are killed by a railroad locomotive at different times, the causes of action are separate and distinct, and if one cause of action is for an amount under fifty dollars, it must be brought before a justice of the peace.
Louisville, etc., R. W. Co. v. Quade, 364
4. *Appropriation of Land.—Successive Additions.*—The making of an appropriation of land by a railroad company for its right of way does not exhaust the power; but new appropriations may be made from time to time, as the necessities of the work may require.
Peck v. Louisville, etc., R. W. Co., 366
5. *Negligence.—Injuries to Travellers at Public Crossings.—Statutory Signals.*—It is the duty of railroad companies to give the signals required by statute when approaching a public crossing, and a breach of this duty constitutes actionable negligence. The purpose of the statutory signals is not merely to give notice that a railroad track crosses the highway, but also to warn travellers on the highway of the approach of trains.
Chicago, etc., R. R. Co. v. Boggs, 522
6. *Same.—Running Trains so Close as to Make Signals Unavailing.*—Where one train is run so close behind another as to make the statutory signals unavailing as means of warning travellers, the railroad company is guilty of negligence. *Id.*
7. *Same.—Right to Instruct as Matter of Law that Disobedience of Statute Constitutes Negligence.*—The court has a right to instruct, as matter of law, that a failure to give the statutory signals at public crossings constitutes negligence. *Id.*
8. *Killing Cattle.—Evidence.*—It is not necessary for the plaintiff in an action against a railroad company for killing cattle, to prove by positive evidence the place where the cattle entered, but it is sufficient if facts are proved from which the place of entry can be inferred.
Evansville, etc., R. R. Co. v. Mosier, 597
9. *Same.—Burden of Proof.*—The burden of proof, in an action against a railroad company for killing cattle, is on the plaintiff to show that the place where the cattle entered was not securely fenced; but where the railroad company asserts that the place was one which it was not bound to fence, then the burden is on it to establish that fact. *Id.*
10. *Same.—Private Crossings.—Fences.*—The general rule is that a railroad company is bound to fence private crossings, but this duty is not owing to the person for whose benefit the crossing is maintained. *Id.*

RAPE.

See CRIMINAL LAW, 4.

RATIFICATION.

See DIVORCE, 3.

REAL ESTATE.

See APPEAL BOND; EVIDENCE, 1; FRAUD, 1 to 5; JUDGMENT; LANDLORD AND TENANT; MARRIED WOMAN; PARTITION; PRINCIPAL AND AGENT; REAL ESTATE, ACTION TO RECOVER; STATUTE OF FRAUDS, 1, 2; TAXES, 2.

1. *Parol Evidence*.—Title to real estate may be proved by parol, where such evidence is not objected to. *Stockwell v. State, ex rel., 1*
2. *Same*.—*Title from Same Source*.—When two persons derive title from the same third person, it is, at least, *prima facie* sufficient to prove derivation from him without proving his title. *Ib.*
3. *Forcible Entry and Detainer*.—*Peaceable Possession*.—*Claim of Right*.—*Restitution*.—*Damages*.—Under section 5237, R. S. 1881, one who, while in the actual peaceable possession of real estate under a claim of right, has been forcibly evicted by the owner, and possession forcibly detained from him, can maintain an action for restitution and damages. *Judy v. Citizen, 18*
4. *Landlord and Tenant*.—*Crops*.—*Trespasser*.—*Notice*.—*Purchaser Pendente Lite*.—The relation of landlord and tenant can not be created by an entry upon land without right, and the person who so enters can not take away crops sown by him, and one who enters during pending litigation, is chargeable with notice and is bound by the judgment rendered. *Krug v. Davis, 75*
5. *Same*.—*Dismissal of Action*.—*Judgment*.—One who assumes to acquire an interest in land while an appeal is pending, is bound by the judgment rendered on appeal, and the dismissal of the action upon its return to the trial court does not relieve him. *Ib.*
6. *Reservation in Deed*.—*Agreement to Refund Price*.—*Measure of Damages*.—Where, in deeds of conveyance to separate tracts of land, but which adjoin each other, made at different times, there is a clause reserving minerals, the right of way thereto, and the right to take and use any or all of said land for purposes convenient for mining and transportation, the grantor agreeing to pay actual damages to improvements and to "refund the price paid for so much of said land as may be so taken or used, with interest," the measure of damages for the taking of a part of each tract is to be determined by ascertaining what ratio the value of the part so taken bore, at the time of the conveyance, to the value of the whole of the tract from which it was taken, and upon a proportionate part of the price of such tract computing interest to the time of the trial; and the whole damages for the land taken is determined by adding the damages for the parts so taken from the several tracts. *American Cannel Coal Co. v. Seitz, 182*

REAL ESTATE, ACTION TO RECOVER.

See APPEAL BOND, 1, 2; LANDLORD AND TENANT, 3 to 5; REAL ESTATE.

1. *Sheriff's Sale*.—*Description*.—*Void Deed*.—*Evidence*.—In ejectment, where the defendant shows title by sheriff's sale and deed, to satisfy a judgment against the plaintiff, the land being described therein exactly as in the deed upon which the plaintiff solely relies to show his title, the verdict must be for the defendant, though by reason of insufficient description of the land both deeds be void. *Coan v. Elliott, 275*
2. *Same*.—*Execution*.—*Sheriff's Return*.—*Appraisement*.—*Evidence*.—Where the sheriff sells land on execution, the appraisement thereof is no part of his return, and if returned it is not even *prima facie* evidence, and if it show no appraisement where that is required, its production is not proof of the fact. *Ib.*
3. *Same*.—*Presumption*.—In ejectment, to show that a sheriff's sale was invalid for want of appraisement, it is necessary to show affirmatively that there was no appraisement, else it will be presumed that the sheriff did his duty. *Ib.*
4. *Title*.—A plaintiff in ejectment must trace his title to the United States, or to some grantor in possession at the date of his conveyance. *Peck v. Louisville, etc., R. W. Co., 366*

5. *Same.*—*Substituted School Lands.*—*Selection.*—Where land originally granted to a State for school purposes became unavailable, and other lands were substituted, it must be shown that such substituted lands were actually selected by the secretary of the treasury, as required by the statutes of the United States; without such selection the title did not pass. *1b.*
6. *Same.*—*Adverse Possession.*—Adverse possession must be continuous, and under claim of right. *1b.*

REDEMPTION.

See SHERIFF'S SALE, 6.

RELEASE.

See PRINCIPAL AND SURETY, 1, 2.

REMAINDER.

See WILLS, 1, 4.

RENTS.

See APPEAL BOND, 1; HUSBAND AND WIFE, 1; LANDLORD AND TENANT; SHERIFF, 4.

REPEAL OF STATUTE.

See COUNTY COMMISSIONERS, 4; TAXES, 1.

REPLEVIN.

See FRAUD, 6, 7.

Execution Defendant.—An execution defendant can not maintain an action to recover personal property seized under an execution, except in cases where it affirmatively appears that the property was exempt from execution. *Hartlep v. Cole, 458*

RES ADJUDICATA.

See COUNTY COMMISSIONERS, 2; FALSE IMPRISONMENT; PLEADING, 5.

RES GESTAE.

See CRIMINAL LAW, 12; HUSBAND AND WIFE, 4.

RESCISSION.

See FRAUD, 1, 5; LANDLORD AND TENANT, 1, 2.

RESTITUTION.

See REAL ESTATE, 3.

REVOCATION.

See GRAVEL ROAD, 2.

RIOT.

See CRIMINAL LAW, 12.

SALE.

See CHATTEL MORTGAGE; CONTRACT, 1 to 6, 8, 9; DECEDENTS' ESTATES, 1 to 3; DELIVERY; INTOXICATING LIQUOR; JUDGMENT, 1; JUDICIAL SALE; MORTGAGE, 8, 9; PRINCIPAL AND AGENT; SHERIFF'S SALE; TAXES; WILLS, 1, 4.

SCHOOLS.

See REAL ESTATE, ACTION TO RECOVER, 5.

1. *Corporation.*—*Power of Trustee.*—*Certificate of Indebtedness.*—*Cause of Action.*—The trustee of a school corporation has power to contract a debt in the name of and binding upon such corporation, in the purchase of necessary furniture, apparatus and other supplies of its schools, and to execute in the name of his corporation a valid and binding certifi-

cate of indebtedness or note for the amount of such debt; and such certificate or note will constitute *prima facie* a good cause of action against such corporation. *Miller v. White River School Tp., 503*

2. *Same.—Statute Construed.*—Such a certificate or note is not rendered invalid by the trustee's failure to comply with the provisions of sections 6006 and 6007, R. S. 1881, as those sections of the statute have no application to the ordinary debts of a school corporation, incurred by the trustee for the usual and necessary furniture, apparatus and other supplies of its common schools. *Id.*

SCHOOL FUND.

See MORTGAGE, 4 to 13; SCHOOLS.

Loan to County Auditor.—*Mortgage, Foreclosure of.*—The auditor of a county executed a mortgage on his land to the State to secure the repayment of money which he borrowed from the school fund in the custody of said county. Afterwards his successor in office entered upon the margin of the record where said mortgage was recorded a statement that said mortgage, by a decision of the Supreme Court of this State, was held to be invalid, "said court holding that a county auditor can not give a mortgage to the State for school funds while acting in that capacity, and the mortgagor," naming him, "having been county auditor when the mortgage was made, the amount of this mortgage was, by direction of the board of county commissioners of" said county, "refunded to the school fund February 29th, 1882." This entry was attested by the signature of the auditor who made it. Afterwards the treasurer of said county, with the approval of the county commissioners, transferred to said school fund from the revenues of the county the full amount of said loan. Afterwards said mortgage and the note which it secured were surrendered to one then the owner of the land, not the mortgagor, and he to whom such surrender was made afterwards sold and conveyed the land to another, who, without notice of these facts, purchased for full value. In a suit against this purchaser by the State, on the relation of a succeeding auditor of said county, to foreclose said mortgage,

Held, that a county auditor can not lawfully both lend and borrow from the school fund, and that said loan was made and said mortgage was executed without authority of law.

Held, also, that such want of authority constituted no defence for the mortgagor or any other person to the foreclosure of the mortgage.

Held, also, that the mortgage remained a subsisting security for the loan against said vendee for value and without notice, notwithstanding the reimbursement of the school fund out of the county revenues, and said entry on the margin of the record, and said surrender of the mortgage without endorsement of satisfaction thereon, and without satisfaction of record. *State, ex rel., v. Greene, 532*

SHERIFF.

See EVIDENCE, 13; REAL ESTATE, ACTION TO RECOVER, 1 to 3; SHERIFF'S SALE.

1. *Compensation for Keeping Jail and Caring for Prisoners.*—The act regulating the fees of sheriffs was intended by the Legislature to be a complete fee bill, prescribing, so far as could be, the services for which they should receive compensation, and the fees designated therein are to be deemed a full remuneration for all services incident to the office, and such officer is entitled to no extra compensation for keeping the county jail and caring for prisoners. *Board, etc., v. Gresham, 53*
2. *Same.—Care of Insane Persons.—Presumption.*—There being no statute authorizing the circuit court to commit insane persons, as such, to the county jail, the presumption is that they were duly committed for

2. *Killing Stock.—Complaint.*—"Sufficiently Fenced."—In an action under the statute, against a railroad company for killing stock, a complaint averring that the railroad track was not "sufficiently fenced" at the place where the animals got on the track and were injured and killed, sufficiently alleges that the track was not "securely fenced," as required by the statute, and is good on demurrer.
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3. *Animals Killed.—Jurisdiction of Justice of Peace.*—Where animals are killed by a railroad locomotive at different times, the causes of action are separate and distinct, and if one cause of action is for an amount under fifty dollars, it must be brought before a justice of the peace.
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4. *Appropriation of Land.—Successive Additions.*—The making of an appropriation of land by a railroad company for its right of way does not exhaust the power; but new appropriations may be made from time to time, as the necessities of the work may require.
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6. *Same.—Running Trains so Close as to Make Signals Unavailing.*—Where one train is run so close behind another as to make the statutory signals unavailing as means of warning travellers, the railroad company is guilty of negligence. *1b.*
7. *Same.—Right to Instruct as Matter of Law that Disobedience of Statute Constitutes Negligence.*—The court has a right to instruct, as matter of law, that a failure to give the statutory signals at public crossings constitutes negligence. *1b.*
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10. *Same.—Private Crossings.—Fences.*—The general rule is that a railroad company is bound to fence private crossings, but this duty is not owing to the person for whose benefit the crossing is maintained. *1b.*

RAPE.

See CRIMINAL LAW, 4.

RATIFICATION.

See DIVORCE, 3.

REAL ESTATE.

See APPEAL BOND; EVIDENCE, 1; FRAUD, 1 to 5; JUDGMENT; LANDLORD AND TENANT; MARRIED WOMAN; PARTITION; PRINCIPAL AND AGENT; REAL ESTATE, ACTION TO RECOVER; STATUTE OF FRAUDS, 1, 2; TAXES, 2.

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4. *Landlord and Tenant*.—*Crops*.—*Trespasser*.—*Notice*.—*Purchaser Pendente Lite*.—The relation of landlord and tenant can not be created by an entry upon land without right, and the person who so enters can not take away crops sown by him, and one who enters during pending litigation, is chargeable with notice and is bound by the judgment rendered. *Krug v. Davis, 75*
5. *Same*.—*Dismissal of Action*.—*Judgment*.—One who assumes to acquire an interest in land while an appeal is pending, is bound by the judgment rendered on appeal, and the dismissal of the action upon its return to the trial court does not relieve him. *Id.*
6. *Reservation in Deed*.—*Agreement to Refund Price*.—*Measure of Damages*.—Where, in deeds of conveyance to separate tracts of land, but which adjoin each other, made at different times, there is a clause reserving minerals, the right of way thereto, and the right to take and use any or all of said land for purposes convenient for mining and transportation, the grantor agreeing to pay actual damages to improvements and to "refund the price paid for so much of said land as may be so taken or used, with interest," the measure of damages for the taking of a part of each tract is to be determined by ascertaining what ratio the value of the part so taken bore, at the time of the conveyance, to the value of the whole of the tract from which it was taken, and upon a proportionate part of the price of such tract computing interest to the time of the trial; and the whole damages for the land taken is determined by adding the damages for the parts so taken from the several tracts. *American Cannel Coal Co. v. Seitz, 182*

REAL ESTATE, ACTION TO RECOVER.

See APPEAL BOND, 1, 2; LANDLORD AND TENANT, 3 to 5; REAL ESTATE.

1. *Sheriff's Sale*.—*Description*.—*Void Deed*.—*Evidence*.—In ejectment, where the defendant shows title by sheriff's sale and deed, to satisfy a judgment against the plaintiff, the land being described therein exactly as in the deed upon which the plaintiff solely relies to show his title, the verdict must be for the defendant, though by reason of insufficient description of the land both deeds be void. *Coan v. Elliott, 275*
2. *Same*.—*Execution*.—*Sheriff's Return*.—*Appraisement*.—*Evidence*.—Where the sheriff sells land on execution, the appraisement thereof is no part of his return, and if returned it is not even *prima facie* evidence, and if it show no appraisement where that is required, its production is not proof of the fact. *Id.*
3. *Same*.—*Presumption*.—In ejectment, to show that a sheriff's sale was invalid for want of appraisement, it is necessary to show affirmatively that there was no appraisement, else it will be presumed that the sheriff did his duty. *Id.*
4. *Title*.—A plaintiff in ejectment must trace his title to the United States, or to some grantor in possession at the date of his conveyance. *Peck v. Louisville, etc., R. W. Co., 366*

between two of such tenants to exchange with each other their undivided interests in definite portions of the common estate, is within the statute of frauds; but it is not necessary, in order to withdraw such a contract from the operation of the statute, that there should be the same character of taking possession as in the case of an ordinary parol agreement for the sale of land; and where, in such a case, in pursuance of the agreement, one of the parties thereto conveyed by deed his interest in a definite portion of the common property, and the grantee took possession of such portion, exclusive of such grantor, who took possession of another portion of the common property, exclusive of the other party to the agreement, and made lasting and valuable improvements thereon, and there was mutual acquiescence in such change of possession for fourteen years;

Held, that there was sufficient part performance to take the contract out of the operation of the statute. *Savage v. Lee*, 514

2. *Same.—Right to Interpose Statute is Personal.*—Only a party to the contract, or his privies or representatives, can repudiate it by interposing the statute of frauds. *Ib.*

3. *Charging Goods to Third Person.—Collateral Promise.*—The mere fact that the seller of goods, at the request of the buyer, charges them to a third person, does not make the buyer's promise to pay a collateral one within the statute of frauds, but such promise is an original undertaking, and is not voidable under the statute. *Lance v. Pearce*, 595

STATUTE OF LIMITATIONS.

See MORTGAGE, 17.

STREETS.

See DEDICATION.

SUBROGATION.

See APPEAL BOND, 3, 4.

SUPERIOR COURT.

See JURISDICTION.

SUPREME COURT.

See APPEAL BOND, 1, 2; ASSIGNMENT OF ERROR; BOARD OF HEALTH, 3; DRAINAGE, 4, 8, 15; EVIDENCE, 8, 15, 21; INSTRUCTIONS TO JURY; JUDGMENT, 4, 5, 6; JURISDICTION; NEW TRIAL, 3, 4; PLEADING, 1 to 3, 10, 23; PRACTICE, 1, 34; SCHOOL FUND; SPECIAL FINDING, 1, 4.

1. *Weight of Evidence.*—Where there is evidence tending to support the verdict, the Supreme Court will not disturb it on the weight of the evidence. *Evansville, etc., R. R. Co. v. Tipton*, 197

2. *Dismissal of Appeal.—Joint Motion.*—Where two or more appellees jointly move the Supreme Court for the dismissal of an appeal, the motion will be overruled, unless it be well taken by each and all who join therein. Where an appeal is properly taken, every party to the judgment below is a necessary party to such appeal, and the separate motion of such a party for the dismissal of the appeal must be overruled. *State, ex rel., v. Cunningham*, 461

3. *Conflicting Testimony.*—The Supreme Court can not weigh conflicting testimony, whatever the form in which it may be presented, but, having regard to the burden of proof, will sustain the decision of the trial court upon the evidence, where it in any degree tends to sustain such decision. *Robertson v. Huffman*, 474

4. *Special Finding.—Request for.—Presumption.*—Where there is a special finding in the record, and the record shows that the finding was made upon the request of one of the parties, the Supreme Court will pre-

sume that the request was properly and seasonably made, unless the record affirmatively shows the contrary. *Clark v. Deutsch, 491*

5. *Practice.—Weight of Evidence.*—The finding and judgment of the trial court will not be disturbed by the Supreme Court on the weight of the evidence. *Allen v. Board, etc., 553*
6. *Practice.—Injunction.—Omission from Record of Motion to Dissolve.*—In the absence from the record of a motion to dissolve an injunction, the Supreme Court will not review the ruling of the trial court thereon. *Clark v. Shaw, 563*
7. *Same.—Discretion of Court.*—Where a demurrer to a complaint for an injunction, and a motion to dissolve the temporary injunction, are pending at the same time, it is discretionary with the trial court as to which it will first rule upon, and the exercise of this discretion will not be reviewed in the Supreme Court. *Ib.*

SURETY.

See APPEAL BOND; GUARDIAN AND WARD, 3; HUSBAND AND WIFE, 2; MARRIED WOMAN; MORTGAGE, 15; PRINCIPAL AND SURETY.

TAXES.

See GRAVEL ROAD, 3; HUSBAND AND WIFE, 7; MANDAMUS; MORTGAGE, 9, 18; RAILROAD, 1.

1. *Invalid Sales by Cities.—Remedy.*—Sections 227 and 228 of the act of December 21st, 1872, providing a remedy for purchasers of real estate at invalid tax sales, and which were applicable to sales of real estate made by cities, were re-enacted and continued in force as sections 217 and 218 of the act of March 29th, 1881, which are likewise applicable to cities, and such remedy has been continuously in force since the date of the first act, notwithstanding its repeal and re-adoption. *McWhinney v. City of Indianapolis, 150*
2. *Same.—Lands Illegally Annexed, Sale of.—Remedy of Purchaser.*—The common council of a city by resolution annexed certain real estate to the city, and assessed the same for taxes for the years 1878 and 1879, and such taxes remaining unpaid said real estate was, on February 15th, 1881, sold to M., and a certificate issued to him. Before a deed was executed the city annulled the annexation, because the land was not contiguous. M. had no knowledge at the time of his purchase that the land was not properly annexed and legally assessed, and before he discovered said facts he paid taxes thereon in addition to the purchase-money. *Held*, that M. can recover from the city, under sections 217 and 218 of the act of March 29th, 1881, the amount of the purchase-money and subsequent taxes paid. *Ib.*
3. *Levy of, by Municipal Corporations.—Precedence of Lien of State, County and City Taxes.*—Municipal corporations in levying taxes are instrumentalities of government, and taxes levied by them are, in legal effect, levied by the State, so that the lien for such taxes is of equal rank and priority to taxes levied for State or county purposes. *Justice v. City of Logansport, 326*
4. *Same.—Purchasers at County Sale for Taxes.—Lien of City Taxes.*—A purchaser at a tax sale made by the county officers takes the land subject to the lien for city taxes existing thereon, if the land is of sufficient value to pay all taxes, but, if the land is not of sufficient value to pay all taxes, then the sale first rightfully made will divest the lien for the other taxes. *Ib.*

TENANTS IN COMMON.

See PARTITION; STATUTE OF FRAUDS, 1.

TENDER.

See CONTRACT, 1 to 3, 9.

TIME.

See CONSTITUTIONAL LAW, 4; DEDICATION, 13; INTOXICATING LIQUOR, 4; JUDGMENT, 6; MORTGAGE, 2, 12.

1. *Statutes.—Construction.—Judicial Knowledge.—Abbreviations.*—Courts judicially know the meaning of abbreviations ordinarily employed and the usual method of computing time. *Hedderich v. State, 564*
2. *Same.—Time, Computation of.*—Time is reckoned by following the hours forward, and is so reckoned as to make the period a consecutive one, unless there is something in the statute indicating a different method. The provision, "between the hours of eleven o'clock P. M. and five o'clock A. M.," means the period intervening between eleven o'clock night and five o'clock morning of the succeeding day. *Id.*

TITLE.

See EVIDENCE, 1, 12; HUSBAND AND WIFE, 7, 9; JUDGMENT, 6; MORTGAGE, 12, 13; PROMISSORY NOTE, 1; REAL ESTATE; REAL ESTATE, ACTION TO RECOVER, 4 to 6; WILLS, 1, 4.

TOWNSHIP TRUSTEE.

See ELECTION; SCHOOLS.

TRANSCRIPT.

See EXECUTION, 1.

TRESPASS.

See REAL ESTATE, 4.

TRUSTS.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; HUSBAND AND WIFE, 1, 7, 9.

USER.

See DEDICATION, 13, 14; HIGHWAY, 1.

VARIANCE.

See CONTRACT, 9; EVIDENCE, 18; SLANDER.

VENDOR AND PURCHASER.

See DELIVERY; FRAUD, 1, 4 to 8; FRAUDULENT CONVEYANCE; LANDLORD AND TENANT, 6.

VENIRE DE NOVO.

See SPECIAL FINDING, 1; VERDICT, 2, 3.

VERDICT.

See HUSBAND AND WIFE, 8; PRACTICE, 28 to 30.

1. *Practice.—Interrogatories to Jury.*—A general verdict for plaintiff can not stand against answers of the jury to interrogatories in conflict with it; and in such case the judgment should be for the defendant. *Jewett v. Meech, 289*
2. *Special.—Venire de Novo.—Motion for New Trial.*—If a special verdict contain findings of evidence, conclusions of law and matters without the issues, such portions will be disregarded in rendering judgment, and a motion for a *venire de novo*, because of such portions of the verdict, will be overruled. If such verdict fail to find material facts proved, the remedy for such failure is by a motion for a new trial. *Indianapolis, etc., R. W. Co. v. Bush, 582*
3. *Same.—Negligence.—Province of Jury.—Conclusions of Law.*—In an action

for damages for an injury occasioned by negligence, a special verdict, after reciting facts, stated that the plaintiff was not guilty of contributory negligence, and that the injury was the result of negligence on the part of the defendant.

Held, that such findings as to negligence were conclusions of law which the jury could not make, and that they must be disregarded under a motion for a *venire de novo* assigning them as the ground thereof. *1b*.

4. *Same.*—*Instructions to Jury.*—Where the rendition of a special verdict is directed, there is no error in refusing to give general instructions as to the law of the case, though the statements in the instructions requested be correct as abstract propositions of law. *1b*.

VERIFICATION.

See DRAINAGE, 2, 20.

VOLUNTARY ASSIGNMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

WAIVER.

See CHATTEL MORTGAGE; DEED, 1, 2; DEMURRER TO EVIDENCE, 3, 4; DRAINAGE, 8.

WARRANTY.

See CONTRACT, 4 to 6; PROMISSORY NOTE, 1.

WIDOW.

See DECEDENTS' ESTATES, 2, 3; DESCENT; MORTGAGE, 23; PARTITION, 2; WILLS, 1, 4; WITNESS, 6.

WILLS.

See CONTRACT, 10; PROMISSORY NOTE, 4.

1. *Life-Estate.—Remainder.—Title.—Judgment Lien.*—A will directed that after the termination of a life-estate in the surviving widow, the executor should sell the testator's real estate, and divide the proceeds, one-tenth to each of the testator's ten children. During the life of the widow, a creditor of one of the children recovered judgments against him. After the death of the widow, the administrator with the will annexed sold the real estate under the power in the will.

Held, that, on the death of the testator, the title to the land vested at once in the children, subject to the widow's life-estate, and the executor's power of sale under the will, and that the judgments were liens upon the one-tenth interest of the judgment defendant.

Held, also, that the liens followed the fund in the hands of the administrator, and became liens thereon superior to any claim of the judgment defendant or his grantee, subsequent to the judgment.

Ballenger v. Drock, 172

2. *Construction of.*—All the parts of a will are to be construed in relation to each other so as, if possible, to form one consistent whole, and so as to uphold all of its provisions, if this can be done consistently with established rules of law. *Brumfield v. Drock, 190*

3. *Same.—When "Heirs" will be Construed "Children."*—The word "heirs," as used in a will, will be construed to mean "children" when it is apparent that the testator employed it in that sense. *1b*.

4. *Same.—Life-Estate.—Devise to a Daughter "and her Heirs, Subject to their Control Only."—Executor.—Naked Power to Sell.*—A testator, after devising a life-estate in land to his wife, directed his executors, after her death, to "sell and dispose of all my property, both real and personal, that may remain, * * * and divide the proceeds thereof among my ten children, in the following manner, or their heirs, as the case may be,

to wit," to each son one-tenth, and to each daughter, naming each separately, and following each name with the words, "and her heirs one-tenth, subject to their control only, it being my intention that my said daughters and their children shall have the sole benefit of their shares of my estate." Before the death of the widow four daughters conveyed away their interest in the land.

Held, that each daughter took one-tenth of the proceeds of such property free from the control of her husband, and in case of her death her children would take such portion, but until then such children have no interest in the estate.

Held, also, that a mere naked power to sell having been conferred upon the executors, they were not invested with any interest in or title to the property.

Held, also, that during the life-estate of the mother, the title was not in abeyance, but it was in the testator's children, and the conveyances by the daughters, during such life-estate, divested them of title to the land and precludes them from claiming any interest in its proceeds. *Id.*

WITNESS.

See CONTINUANCE; CRIMINAL LAW, 4, 5; EVIDENCE, 2 to 4; PRACTICE, 8, 11.

1. *Cross-Examination.—Practice.*—It is proper, on cross examination, to propound questions showing the character and antecedents, and exhibiting the motives and interest, of a witness, for the purpose of affecting his credibility; but specific acts of immorality or misconduct of a witness can not be proved for the purpose of discrediting his testimony. *Bessette v. State, 85*
2. *Same.—Discretion of Court.*—The extent to which a cross-examination may be carried is ordinarily a matter resting in the sound discretion of the trial court. *Id.*
3. *Credibility.—Cross-Examination.*—Any fact tending to impair the credibility of a witness, by showing his interest or bias, may be elicited on cross-examination. *Burnett v. Feary, 95*
4. *Effect of Contradiction on Collateral or Immaterial Matter.*—Where a witness is contradicted on some merely collateral or immaterial matter in a cause, his testimony as to material facts ought not, on that account, to be wholly disregarded. *Harper v. State, ex rel., 109*
5. *Practice.—Cross-Examination.*—A question to a witness on cross-examination, which seeks to elicit testimony regarding a matter not in any way referred to in the direct examination, is improper. *Higham v. Vancosdol, 160*
6. *Competency of.—Party in Action by or against Widow concerning Land Derived from Husband.*—A party is not a competent witness as to matters which occurred prior to a husband's death, in an action concerning the title to land derived by the widow from her deceased husband. *Cuthrell v. Cuthrell, 375*

WORDS AND PHRASES.

See STATUTES, 2; TIME; WILLS, 3.

WRITTEN INSTRUMENT.

See PLEADING, 8, 18; PROMISSORY NOTE.

END OF VOLUME 101.

Ex. is. a. a.

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